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In The

Supreme Court of the United States

October Term, 1967

No. 1213

JOHN R. SANDERS,

Petitioner,

v.

JOHN G. BONOMI,
(The Association of the Bar of the City of New York)

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE
STATE OF NEW YORK

The petitioner John R. Sanders prays for a writ of certiorari issue to review the Order of the Court of Appeals of the State of New York entered on October 24, 1967, in this proceeding.

OPINION BELOW

The order of the Court of Appeals, the Opinion of the Appellate Division its order and the Referee's report appears in the Appendix of this Petition.

JURISDICTION

The order of the Court of Appeals of the State of New York was entered on October 24, 1967. The time for filing this petition was extended to March 7, 1968 by order of the Honorable John Marshall Harlan on January 17, 1968. Jurisdiction in this Court is invoked under Rule 19, 1 (a).

QUESTIONS PRESENTED

1. Does a state court have the power or right to deny the right of confrontation to an accused of witnesses against him in the presentation of evidence on direct examination of the witnesses in his absence?

2. Can a state court, merely by granting the right of cross-examination at a later date, satisfy the constitutional prerequisites of due process and equal protection under law?

3. Is confrontations and cross-examination one and the same or are they separate and distinct under the rules of this court?

4. Are the guarantees of due process and the confrontation of witnesses denied:

(a) when a state court proceeds in the absence of the accused, the state court, having knowledge that the accused is under a Federal Order to appear in a Federal court and thus would be in contempt for failure to comply;

(b) in so proceeding can a State Court justify its action on the theory of an exercise of discretion;

(c) when the accused is thus so ordered by the Federal Court and cannot remain to attend the hearing in the State Court without penalty and pain of contempt proceedings in the Federal jurisdiction as well as further discipline by the respondent herein does this constitute a waiver of his rights and an abandonment of the proceedings;

(d) under the supremacy clause of the constitution should he disregard the Federal Order and submit to the lesser jurisdiction of the State Court, and does the State Court have

the power to issue such an edict;

(e) to coerce him by threat to deny him his constitutional rights and actually do so for failing to obey an illegal order which order is such because it is in contravention of a prior Federal Order with which it is inconsistent?

5. Where hearings of this nature are systematically conducted in private does this not constitute a further violation of an accused's right to a public hearing?

CONSTITUTIONAL PROVISIONS INVOLVED

U.S.C. COURT. AMEND. V. - CAPITAL CRIME; DOUBLE JEOPARDY; SELF-INCRIMINATIONS; DUE PROCESS; JUST COMPENSATION FOR PROPERTY:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property

without due process of law; nor shall private property be taken for public use, without just compensation.

AMEND. VI. - JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS.

In all criminal proscutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMEND. XIV. - CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION: DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process

of law; nor deny any person within its jurisdiction the equal protection of the laws. * * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article

* * *

Section 1. Due Process of Law *** nor shall any state deprive any person of life, liberty or property without due process of law; * * *

UNITED STATES CONSTITUTION, ARTICLE VI:

All debts * * * confederacy.

This Constitution and the laws of the United States which shall be made in Pursuance thereof and all Treaties made, or which shall be made under the Authority of the United States shall be the supreme Law of the Land; * * *

STATEMENT OF THE CASE

Petitioner, John R. Sanders, at all times pertinent to this case, was an attorney-at-law, duly licensed to practice in the State of New York and elsewhere, having been admitted to the Bar on April 2, 1951 (A. 1-b).*

The questions raised herein are the result of a hearing conducted pursuant to Article 4 of the Judiciary Law, section 90, subdivision 2, etc., on charges alleging misconduct.

Preliminary hearings before a Committee on Grievances were held and completed, together with their findings, on April 16, 1964.

Respondent's petition containing the charges was verified on January 8, 1965 (A. 1-a).

The order appointing the Referee herein is dated March 18, 1965, and was sworn to April 23, 1965 (A. 1-a).

No hearing was held in June 1965, because Respondent's witnesses did not appear for employment reasons (R. 14, 15, 28), although Petitioner was ready to proceed in June 1965 (R. 11).**

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* References to the Appendix will be cited herein in a form, "A. ".

** References to the Record on Appeal will be cited herein in the form "R. ".

Prior thereto the Referee had granted Respondent two adjournments because the witnesses Underdown were ill (R. 59).

It was not until September 15, 1965 that the first hearing date in this proceedings was set (R. 1).

It is to be noted that a period of almost one and a half years elapsed from the time of the completion of the Committee's preliminary investigation to the date of the first hearing, during which time, the hearing was delayed by Respondent's three postponements or delays.

On September 15, 1965, Petitioner appeared before the Referee and requested an adjournment (R. 11-15).

Petitioner had been marked ready for trial as of September 6, 1965 (R. 13-16) a juror had been sworn on September 9, 1965, putting Petitioner actually on trial pursuant to the Code of Criminal Procedure (R. 12).

Petitioner had given Respondent at least two days notice of the engagement (R. 5, 6); and had attempted to notify the Referee at his residence beforehand and had left a message there (R. 12).

Respondent, having previously been notified, in turn notified the Referee (R. 8).

As of September 13, 1965, Respondent knew Petitioner was on trial; saw Petitioner in the Criminal Courts building; discussed the fact with him and the trial court, Mr. Justice Saypol in part 32 of the Supreme Court, New York County, but did not mention to Mr. Justice Saypol that Petitioner was due to appear before the Referee in this proceeding on September 15, 1965 (R. 6, 8-9).

Petitioner had indicated to Respondent and on September 15, 1965 he also indicated to the Referee that he was anxious to proceed (R. 10, 14) but that he did not wish to waive his rights, that bringing the witnesses back for the purpose of cross-examination would not be ample in the protection of his rights (R. 18, 19, 20, 25, 35).

When the Referee indicated that he was going to proceed in Petitioner's absence, Petitioner actually begged and begged him again not to follow his avowed course. Having no choice, Petitioner requested that he be permitted to bring the witnesses back, at his expense, in payment for an adjournment (R. 18, 19, 20, 25, 36, 41). Failing this the Referee would have proceeded forthwith.

As it turned out it was the witnesses, in effect, who obtained the adjournment for Petitioner for the Referee would not have done so and would have proceeded in the absence of Petitioner (R. 18, 19, 20, 25, 35). The witnesses were very interested in protecting Petitioner's rights, and were not concerned about

returning again (R. 29, 30, 32, 35).

The Referee contended that Petitioner should not have permitted a Supreme Court Justice of the State of New York to order him to trial in a case and should not have defied such orders for a period of nine days, that being the amount of time from the order of trial to the adjourned date at which time the hearing before the Referee was to commence, not saying, in the meantime, how Petitioner could have contravened the Order of the Supreme Court (R. 23, 24).

Moreover, Petitioner could not have reasonably objected to the trial in that it was to last for a period of but five days all of which was known to the Respondent and the Referee (R. 6).

Because of the nature of the case and in view of the many times it had been adjourned, it had been moved into a Mr. Justice Saypol's Court (Part 32) on a priority basis (R. 13, 19).

On June 9, 1966 Petitioner appeared before the Referee and requested an adjournment on the grounds that he was presently engaged on a trial in the United States District Court for the Southern District of New York and had been for a period of a month. He was due to go into cross-examination within one-half hour. He desired to remain but could not as he would be held in contempt by the District Judge. It was his impression that he had a legal excuse

for requesting an adjournment (R. 45, 46).

Petitioner stated that he wished to preserve his right to confront the witnesses, cross-examine them, make objections, etc. (R. 46). He wished to be present when these witnesses testified and he thought it was only fair that the case should be adjourned since these same witnesses were ill and had failed to appear on the previous adjourned date (R. 46).

In the meantime, while Petitioner was still engaged in the United States District Court on the same case the hearing herein was scheduled for May 4, 1966. Prior thereto Petitioner notified Respondent and the Referee, requested an adjournment, but the same was denied by the Referee.

This required Petitioner to bring on an order to show cause staying the proceeding before the Referee.

Instead of signing the order staying the proceeding, Mr. Justice Breitel of the Appellate Division of the Supreme Court held a conference in his chambers on May 3, 1966, with Respondent and Petitioner present.

Petitioner's affidavit in support of his application for a stay was before the Appellate Division and it, as well as Petitioner, among other things stated and made the following requests:

Petitioner had requested an adjournment from the Referee by telegram and that Respondent knew this. Previously, Petitioner had received but one adjournment whereas Respondent had received three and that Petitioner's request heretofore made was born of dire necessity for the reason that he was participating in an ordered trial. (A. 3g, 4g)

The Referee indicated that despite any other engagements the matter before him would proceed whether or not Petitioner was able to attend in person or be represented by counsel. (A. 7g).

Petitioner was informed by the Referee that the matter before him took precedence over all other state and federal matters and that Petitioner, on the other hand did not "accept" engagements to frustrate the state court. (A. 4g, 5g)

Respondent was informed many weeks prior to Petitioner's engagement in the United States District Court. The trial consumed in excess of nine weeks. Respondent was informed of Petitioner's present engagement at the time the application for the stay was made to the Appellate Division. (A. 4g, 5g)

That based upon the foregoing and other matters more precisely set forth in Petitioner's affidavit (A. 6g), Petitioner was powerless to act for

on April 26, 1966, the said federal case was marked ready for trial and assigned to a District Judge. Petitioner and co-counsel on the case were notified and given direct order by the United States District Court which was to be related to all other courts. (A. 6g, 7g).
The order stated that Petitioner was actually engaged on trial; that he was not to accept any other engagements; that this was a direct order of the Federal Court; that affidavits of actual engagement were to be presented to other courts and that Petitioner was to remain on call. (A. 7g)
Had Petitioner acted otherwise he would be in contempt of court and subjected to punishment by Respondent.

Petitioner requested an adjournment of the matter before the Referee until after the completion of the case on trial in the District Court. (Emphasis added). (A. 8g).

Petitioner, at the conference before Mr. Justice Breitel, estimated that the Federal case would be terminated by June 9, 1966 but asked that a later date be set to be safe, but this application was denied (R. 47). Petitioner had also requested that no date be set until after the Federal case terminated but this application was also denied (A. 8g).

The Referee was also informed that the case had continued beyond all expectations because of unforeseeable incidents and acts of God, such as the death of three relatives of a juror, two in one day; the illness of a defendant, the illness of a juror and the death of an attorney's wife (Samuel Segal, Esq.). About 10 days were lost. This necessitated a further adjournment and it was requested (R. 48, 49, 50).

Respondent was directed by Mr. Justice Brietel to (and he did) follow the case independently, going as far as discussing it with the United States Attorney for the Southern District, so that he knew the order of the United States District Court was still in force and Petitioner engaged as before when he brought his witnesses to New York from Washington, D.C. (R. 51, 58).

A letter was sent to Petitioner on May 4, 1966, without a stipulation, the latter of which was to cover what had been agreed upon in the conference before Mr. Justice Brietel. The stipulation was not included in the letter. Petitioner notified Respondent of this fact. The stipulation was not received until May 24, 1966 (R. 51, 52).

In a conversation prior to June 9, 1966, with Respondent, Petitioner stated that he had not signed the stipulation because "I do not want to hang myself", meaning that paragraph 6 of the stipulation (A. 2h) was not part of the agreement made before Mr. Justice Breitel of the Appellate Division for this paragraph required Petitioner to make any further applications for an adjournment

to the Referee and he, the Referee, had, at the commencement of the proceedings before him indicated that he would not, under any circumstances, grant an adjournment then or in the future. More than that, Petitioner meant that he could foresee by that time that the trial was going to proceed beyond the June 9th date. He did not wish to waive his rights in either circumstance (R. 52, 53).

Petitioner could not ask to be relieved in the Federal Court because he was due to proceed with cross-examination in the case momentarily (R. 45). He was ordered by the Federal Court not to be present; he had no legal excuse for failing to appear and if he had failed to appear he would have been subject to be held in contempt of that court (R. 54).

The Referee stated that Petitioner had not sent funds for transporting the witnesses from Washington. Petitioner replied that he did not wish to do a foolish thing by sending money for the transportation of the witnesses and bringing them to New York, knowing that he was still ordered on trial in the Federal Court and could not appear, for by Petitioner doing an act in furtherance of the witnesses being brought to New York City would constitute an act in furtherance of waiving his rights, (R. 56, 57).

On the other hand, Respondent transported the witnesses to New York, knowing that Petitioner was still on trial in the said Federal Court and ordered to be there and could not possibly appear (R. 51, 57, 58, 59).

The Referee said that he was going to proceed nevertheless. Thus being bludgeoned, Petitioner again requested that he be permitted to pay the expenses of bringing the witnesses back to New York for the hearing, even though the case had been adjourned twice due to their illness alone (R. 58, 59).

Petitioner reminded the Referee that he had inconvenienced the witnesses only once, if at all, for on that occasion he had given at least two days notice of his actual engagement on trial and on that occasion the witnesses were not concerned -- neither then nor at any other time did they indicate that they would be unwilling to return. Every statement in the record indicated their willingness to return (R. 59, 60, 18, 19, 20, 25, 35).

The Referee was determined to take testimony from the witnesses in the absence of Petitioner, and did, to which Petitioner objected and took an exception. He did not abandon the hearing and wished to be present but was required by order to return to Federal Court or be held in contempt (R. 60, 61, 62 to 155).

The Referee also received forty exhibits in evidence in the absence of Petitioner (R. 156, 157, 158).

Petitioner, having at all times reserved his constitutional rights on the record, as a last resort, agreed to pay the expenses of the witnesses so that he might cross-examine them (R. 245 to 249).

Again and just prior to their cross-examination, Petition, on November 3, 1966, reserved his rights of being present and confronting the witnesses and make objections on direct examination. This application was denied even though the testimony of the main witness against consumed only fifty pages. It could have been stricken from the record and taken anew. By reason of his ruling, Petitioner proceeded to cross-examine the witnesses (R. 261-266).

THE NATURE OF THE DECISION BELOW

Although the questions presented to the Appellate Division of the Supreme Court of the State of New York included both questions on the merits and the constitutional questions raised herein, only constitutional questions were raised in the Court of Appeals of the State of New York. It therefore follows that the latter Court decided the constitutional questions now raised in this Court.

REASONS FOR GRANTING THE WRIT

1. Apparently, no decision exists in the State Court which is applicable to the case at Bar. In argument before the Court of Appeals (Hon. Kenneth B. Keating) which granted Petitioner's application for a stay of the Appellate Division's order of disbarrment, Respondent was frank to admit this.

2. The Writ of Certiorari should be granted for the reason that the State Court has decided a Federal question in substance in a manner not in accord with the applicable decisions of this Court (Rule 19, 1a).

3. THE HEARING BELOW IS IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION IN THAT IT CONSTITUTED A DENIAL OF THE PETITIONER'S RIGHT OF CONFRONTATION AND TO BE PRESENT DURING THE DIRECT EXAMINATION OF THE WITNESSES AGAINST HIM.

The Appellate Division and the Court of Appeals of the State of New York rendered no opinions having to do

with the right of confrontation and the right of the accused to be present when evidence was taken by the Referee in a direct examination of witnesses who appeared against the accused (A. 1c, 1b).

Essentially, the Referee's decision, confirmed by the Appellate Division and the Court of Appeals was predicated upon two themes:

a. That the Petitioner had waived his rights by agreement,

b. That his duty to appear before the Referee and the State Court was paramount to his ordered appearance in the Federal Court and that despite the orders of the Federal Court to appear, his compliance with such orders constituted an abandonment of the hearing in the State Court. Therefore, he, the Referee, ruled that in the exercise of his discretion he could rightfully deny to Petitioner the right to confront the witnesses against him on direct examination. His reasoning is that confrontation at a later date is sufficient to comply with the constitutional prerequisite of confrontation and the necessity of having the accused present during said examination (A.26a). With this we do not agree nor do the prevailing decisions of this Court.

This Court held in Willner v. Committee on Character an' Fitness, 373 U.S. 96 (1963) that:

> "the requirements of fairness are not exhausted in the taking or consideration of evidence,

but extend to the concluding parts of procedure as well to the beginning and intermediate steps. Id., at 20, 58 S.Ct. at 777. Cf. Gonzales v. United States, 348 U.S. 407, 414, 75 S. Ct. 409, 413, 99 L.Ed. 467."

In this case (Willner) the Petitioner was denied admission to the Bar without a hearing on charges filed against him. This Court held that before one could be excluded from the practice of law, due process must be afforded the accused and was careful to say, as stated above, that this includes all parts of procedure from the beginning, intermediate steps as well as the concluding parts. It ordered that all steps necessary be taken. This would, of course, include due process at the time the witnesses, as in the case at Bar, were testifying against accused on direct examination. This is taken to mean, under the facts of this case, "the beginning steps."

This Court granted certiorari in the Willner case because the issue there presented was justiciable and a controversy and the denial of Willner's rights to practice law were founded in the Fourteenth and Six Amendments.
Willner case, supra, at Page 1179-80

The ruling in the Court below is inconsistent with the ruling now discussed for the reason that it avers that the Court may grant an accused either cross-examination or confrontation but need not permit both. This is what the Court below did. It reasoned that by

permitting cross-examination as an alternative for confrontation after the direct testimony was taken of the witnesses, the constitutional guarantees were satisfied. This Court ruled otherwise when it said:

> "We have emphasized in recent years that procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livlihood. See Greene v. McElroy, 360 U.S. 474, 492, 496-497, 79 S.Ct. 1400, 1411, 1413, 3 L.Ed. 2d 1377, and cases cited. That view has been taken by several state courts when it comes to procedural due process and the admission to practice law. Coleman v. Watts, Fla., 81 So. 2d 650; Application of Burke, 87 Ariz. 336, 351 P. 2d 169; In re Crum 103 Or.296, 204 P. 948; Moity v. Louisiana State Bar Ass'n, 239 La. 1081, 121 So. 2d 87. Cf. Brooks v. Laws 92, U.S. App. D.C. 367, 208 F. 2d 18, 33 (concurring opinion). We think the need for cnnfrontation is a necessary conclusion from the requirements of procedural due process in a situation such as this. Cf. Greene v. McElroy, supra; Cafeteria and Restaurant Workers Union, Local 473v. McElroy, 367 U. S. 886, 81 S. Ct. 1743, 6 L.Ed. 2d 1230."

The error of the Lower Court was in construing, if it did at all, the Willner case in the disjunctive rather than the conjunctive. That is to say, there must be extended to the accused the right of confrontation as well as cross-examination. Permitting the accused to read a transcript of testimony taken in his absence does not satisfy the minimal requirements of due process and equal protection, for it is no more than a deposition at best and when taken in his absence none can deny that the presence of the accused is lacking as well as confrontation.

In this respect, needless to say, an accused may be apprised of what had been said against him by reading a transcript of a record. In answer to this view, this Court, at Page 1181, said:

> "*** there seems no question but that Petitioner was apprised of the matters the Committee was considering.
>
> "But a 'full hearing' - a fair and open hearing - requires more than that. *** Moran v. United States, 304 U.S. 1, 18-19, 58 S. Ct. 773, 776, 82 L. Ed. 1129."

In the next paragraph the Court continued its discussion concerning the requirements in the taking or consideration of evidence, stating that it included all steps.

Two years after the Willner decision, this Court reemphasized the necessity for confrontation. The Court granted certiorari to a defendant who had been convicted in the State of Texas where a transcript of a witness's testimony given at a preliminary hearing was introduced into evidence over defendant's objection. The defendant was not represented by counsel and had no opportunity to cross-examine the witness. The Court decided, among other things, that the Sixth Amendment's guarantee, protecting an accused's right to confront a witness was supported by the Fourteennth Amendment; that the right of confrontation is implicit in the Fourteenth Amendment to grant confrontation as a matter of due process. Pointer v. State of Texas, 380, U.S. 400, 13 L ed 2d 923, 85 S Ct. 1065.

More than that, however, the Court reemphasized the conjunctive nature of confrontation and cross-examination, as is illustrated by the following quotes from the case:

> "The question we find necessary to decide in this case is whether the Amendment's guarantee of a defendant's right 'to be confronted withthe witnesses against him,' which has been held to include the right to cross-examine those witnesses, is also made applicable to the States by the Fourteenth Amendment."(at Page 401)

This Court did not conclude its reasoning on the conjunctive theory of confrontation and cross-examination but continued by saying:

> "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel. Compare Willner v. Committee on Character & Fitness, 373, U.S. 96, 103-104, 83 S. Ct. 1175, 1180-1181, 10 L. Ed. 2d 224" (at Page 406)

Continuing in the conjunctive for reemphasis, the Court states:

> "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." (at Page 405)

The Court below in failing to distinguish between the separate rights accorded an accused and its having taken a singular disjunctive approach was error.

THE DECISION OF THE COURT BELOW WAS PREDICATED UPON NOTHING MORE THAN AN AFFIDAVIT OR DEPOSITION SINCE THE DIRECT TESTIMONY WAS TAKEN IN THE ABSENCE OF THE ACCUSED AND THUS WAS VIOLATIVE OF BOTH THE COMMON LAW RIGHT OF THE ACCUSED TO BE 'PRESENT' AS WELL AS THE CONSTITUTIONAL RIGHT OF 'CONFRONTATION.'

So that justice will not be frustrated, depositions are permitted as an exception to the hearsay rule under well defined limits such as where the witness is dead, insane, too ill ever to attend or expected to attend and where the witness is kept away by the connivance of the adverse party.

Even so the adverse party is permitted all of the constitutional safeguards possible under the circumstances. The within case was not one requiring depositions because of the availability of the witnesses. What is worse, however, is that the Referee proceeded in a manner which accorded Petitioner less safeguards than would have prevailed if the evidence had been taken by deposition. At best, when reduced to it's true substance it amounted to Petitioner, in futility, attempting to cross-examine the witnesses as to their previous sworn statement or affidavit for we dare not give it the status of a true deposition.

Is this rationale correct and of substance? We think it is by analysis of another ruling of this Court and this Court so ruled in Snyder v. Massachusetts, 291 U.S. 97, 78 Law Ed. 674.

The Court held that whenever it is important that an accused be present, the Fourteenth Amendment so requires but when no purpose would be served and his presence useless or the benefit shadowy, then his presence is not required.

The Court distinguished between proceedings at the trial and motions before and after trial and appeals as examples of importance for presence and confrontation and those which were not important.

It also mentioned the distinction between the old common law right of presence and the newer constitutional right of confrontation and their application. Said the Court:

> "***Our concern is with its extension when unmodified by waiver, either actual or imputed.
>
> In all the cases thus assumed the presence of the defendant satisfies the test that was put forward a moment ago as basic and decisive. It bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend. ***
>
> The underlying principle gains point and precision from the distinction everywhere drawn between proceedings at the trial and those before and after. ***
>
> Confusion of thought will result if we fail to mark the distinction

> between requirements in respect to presence that have their source in the common law, and requirements that have their source, either expressly or by implication in the Constitution. Confusion will result again if the privilege of presence be identified with the privilege of confrontation, which is limited to the stages of the trial when there are witnesses to be questioned. It was intended to prevent the conviction of the accused upon depositions or ex parte affidavits, and particularly to preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross-examination. ***
>
> So far as the Fourteenth Amendment is concerned, the presence of a defendant is a condition of due process to the extent that a fair trial and a just hearing would be thwarted by his absence, and to that extent only." (291 U.S. 106, 107, 108)

There is no common law or constitutional precedent, state or federal, for the utilization of cross-examination, after there has been a denial of confrontation of the witness on the event of his giving direct evidence when the accused was not present, as and for a protective device in a fair trial (U.S.C., Amd'ts 5 and 14).

BECAUSE OF THE SUPREMACY CLAUSE OF THE CONSTITUTION, A STATE COURT MAY NOT ISSUE AN ORDER WHICH CONTRAVENES AN ORDER ISSUED BY A FEDERAL COURT AND BY IT'S ORDER INTERFERE WITH FEDERAL COURTS AND THEIR ACTIVITIES.*

On April 26, 1966, Petitioner, who represented a defendant in a federal criminal case which involved many other defendants and their attorneys, was ordered to trial by the court in the Southern District of New York (R. 45, 46). The facts of the federal order were explicit and direct and further stated that Petitioner was actually engaged on trial; that he was not to accept any other engagements; that affidavits of actual were to be presented to other courts and that Petitioner was to remain on call (A. 7g).

On April 29, 1966, the state court and Respondent were notified that Petitioner was engaged as stated above and therefore requested an adjournment. The state court (Referee) denied this request (R. 45, 58, 59, 60).

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* On this issue it is respectfully suggested that the reader peruse the entire colloquy from page 44 to 62 to reduce repetitive reading and for clarity. (See official transcript of minutes)

On May 3, 1966, Petitioner submitted the facts to the Appellate Division of the Supreme Court (Mr. Justice Breitel) for relief staying the state court from proceeding on May 4, 1966 in Petitioner's absence and for an adjournment "until after the completion of the case of United States against Leroy Davis" (R. 46, 47, 50, 51, 52, 53) (A. 8g).

Though the Appellate Division did not sign the submitted order executing the stay of the proceeding the facts therein were before the court and were argued orally in conference with the court by Petitioner and Respondent (R. 50, 51)

In lieu of this, the state court (Appellate Division) adjourned the case before the Referee until June 9, 1966. The latter date has been characterized copper-clad", the last, empowering the state court to proceed in the absence of Petitioner who appeared pro se (R. 51, 55)

On the adjourned date, June 9, 1966, because of unforeseen circumstances, the case on trial in the federal court had not terminated (R. 48, 49, 50). Notice was given to Respondent who would not agree to an adjournment unless the application was made in the state court.

The application was made in the state court before the Referee and the facts and circumstances surrounding the necessity explained to the Referee, though it was known to him (R. 48), together with a request that the proceedings not be conducted in Petitioner's

absence, all of which was denied (R. 45, 46, 47, 48, 49, 50)*

Several questions are presented on this statement of facts:

1. Does a state court have jurisdiction to issue a binding order which conflicts with a previous federal order?

2. Would such an order conflict with the supremacy clause of the Constitution?

3. May the state court nullify the rights of one in the position of Petitioner by it's issuance?

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* One of the best-known secrets in the Southern District of New York, involving both the state and federal courts, is the subdued but hostile jurisdictional battle that exudes in these courts and plagues the entire bar. The various courts have conflicting claims to jurisdiction.

Attorneys are engaged on trial by the courts on what may be best described as on a 'catch as catch can' basis or the court who can, by having the attorney physically before it, engage the attorney first. One may be certain that when a case is on the trial calendar and the court is ready to proceed to trial the attorney cannot obtain an adjournment to appear on a case for trial in futuro. This is so without regard to (footnote continued on following page)

4. Is it within the discretion of a state court to order a party to appear before it when that party is under a previous order to appear in an engagement in the federal court?

5. Is the jurisdiction of the Appellate Division of the Supreme Court of the State of New York, paramount to an actual engagement in a United States District Court?

6. Is a trial attorney, presently engaged, called upon to interrupt a trial in a United States District Court to attend a proceeding in a state court?

(Footnote continued from preceding page)

whether or not the case that will appear at a later date is superior or inferior, jurisdictionally. The attorney is merely directed to submit an affidavit to the latter court, attesting to his present engagement. This 'first come first served' theory is unquestionably recognized in all courts in this jurisdiction as the law of 'legal excuse'. Never before has it been questioned as the law, except in the case at bar.

More than likely the jurisdictional struggle and it's attendant tug-of-war-like hostility is due to the extreme calendar congestion that has afflicted

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(Footnote continued on following page)

7. Was there a waiver of Petitioner's rights in the case at bar?

8. Was there an abandonment of the proceedings in the state court when the Petitioner obeyed the federal mandate?

The one step that was taken, a conference and understanding in the Appellate Division before Mr. Justice Breitel on May 3, 1966, was an ultra vires state intrusion upon the conduct of an existent federal trial which Petitioner had been ordered to attend (R. 50, 51, 52). The state court had no authority to issue an in terrorem order

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(Footnote continued from preceding page)

the area. State courts go so far as to send clients to the federal trial courts to accost attorneys with messages concerning their failure to appear in the state court, even though the attorney had submitted an affidavit informing the court that he is actually engaged on trial in the federal court.

In candor, it must be said, the pressure generally comes from the state courts, as in the case at bar.

Federal courts are often called upon to arm attorneys either with a signed

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(Footnote continued on following page)

for Petitioner's appearance in the state court on June 9, 1966 (R. 50, 51). For at that time, the state court adjourned a hearing scheduled for the following day before the Referee, on condition that it proceed on June 9, 1966. The adjournment to that date was absolute but moreover in conflict with the preceding federal order demanding Petitioner's presence (R. 50, 51). The fact as to whether Petitioner, who was the attorney for a defendant in the trial of a multiple-defendant, multiple-count, conspiracy prosecution in the United States District Court for the Southern District of New York, United States v. Aiken, et. al., 64 CR-1111, had or had not concluded, was deemed of no consequence (R. 45, 50, 51).

(Footnote continued from preceding page)

letter or a statement on the official record, a transcript of which is given the attorneys for their protection. (See letter, Honorable Inzer B. Wyatt, U.S. D.J., dated April 22, 1966, Appendix I. For a statement on the record by the same judge to the same effect, see also official record U.S. v. L. Bailey, et. al, Southern District of New York.)

Needless to say, Petitioner who was on trial in the case received both.

Thus arrayed, the courts have invented methods of survival in the way jurisdiction is obtained over the attorney.

(Footnote continued on following page)

As was inexorably to happen, the trial in the federal court did not conclude by that date. The Petitioner was under a continuing mandate of the United States District Court, Judge John M. Cannella, presiding, to be present at each and every session of the trial, and thus could not remain before the Referee (R. 48, 49).

It is respectfully submitted that the questions put can summarily be decided by the application of the supremacy clause of the Constitution:

(Footnote continued from preceding page)

The method generally utilized by the state courts is simply by swearing one juror and nothing more. Officially, and as a matter of law, the case is declared on trial and the attorney may do nothing more until the termination of the case. He is directed to so state to all other courts by affidavit that he is actually engaged.

In the federal court, the same result is accomplished by a direct order. This is what occured in the case at bar.

Whatever relative merit exists on either side the attorney is caste upon the horns of a dilemma from which only this court can extricate him. Petitioner asks this, not for himself alone, but also for the many thousands suffering attorneys who find themselves similarly situated.

"All debts *** confederacy.

This Constitution and the laws which shall be made in Pursuance thereof and all Treaties made or which shall be made under the authority of the United States shall be the supreme Law of the Land;" *** (U.S.C., Art. 6).

Should this court sustain the thrust of the state court herein, that force would tend to regulate the federal judiciary and contribute to a breakdown in the administration of justice. A case which supports Petitioner's contention in it's statement of the law is Mayo v. United States, 319 U.S. 441, 64 S. Ct. 27, wherein it was held that the activities of the federal government, being a government of delegated powers, may not be regulated by any state, even its purpose be laudible to its people and in their interest.

The issue before the Court was raised by the act of the state of Florida in the regulation of fertilizer by label or stamp. This Court, Mr. Justice Reed, delivering the opinion of the Court, said:

" *** Since the United States is a government of delegated powers, none of which may be exercised throughout the Nation by any one state, it is necessary for uniformity that

the laws of the United States be dominant over those of any state. Such dominancy is required also to avoid a breakdown of administration through possible conflicts arising from inconsistent requirements. The supremacy clause of the Constitution states this essential principle.Article Vi. A corollary to this principle is that the activities of the Federal Government are free from regulation by any state. No other adjustment of ompeting enactments or legal principles is possible *** (at page 445)

*** But, where, as here, the government action is carried on by the United States itself and Congress does not affirmatively declare its instrumentalities or property subject to regulation or taxation, the inherent freedom continues." ***(at page 448). See also cases in note 5, and Kalb v. Feuerstein, 308, U.S. 343.
UNITED STATES CONSTITUTION, ARTICLE 6.

COMPLIANCE WITH THE FEDERAL MANDATE TO BE PRESENT IN THE FEDERAL COURT AND WITHIN ITS JURISDICTION DID NOT CONSTITUTE A WAIVER OF CONSTITUTIONAL RIGHTS AND AN ABANDONMENT OF THE PROCEEDINGS IN THE STATE COURT.

A defendant, after a trial had commenced, told his attorney that he did not want to go back into the courtroom. The trial judge continued the trial in the absence of the defendant without ascertaining whether or not he had waived his right to be present at the trial. It was held that the right to be present must be intelligently and competently waived. Since this was not so a new trial was ordered. Cross v. U.S., 325 F. 2d 629 (1963).

The language of the case, viewed in the light of the facts at bar, wherein the Petitioner not only preserved his rights on the record of the trial court but utilized every possible means at his disposal to prevent the trial court (Referee) from proceeding in his absence. As is well known by now, Petitioner was required to be within the jurisdiction of a federal court. By no stretch of the imagination could this be deemed a waiver or abandonment.

In discussing the subject of waiver, the Court, through Judge Wright, said:

> " *** It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' *** This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and

> competent waiver by the accused." *** This means that where the defendant is available, "the serious and weighty responsibility" of determining whether he wants to waive a constitutional right requires that hebe brought before the court, advised of that right, and then be permitted to make "an intelligent and competent waiver." This has been the uniform practice. *** (at page 631).
>
> *** "Since the right to be present at trial is "scarcely less important to the accused than the right of trial," some such procedure is certainly indicated before a trial judge can determine whether the defendant has made an intelligent and competent waiver. At least an on-the-record statement in open court by the defendant himself should be required." *** (at page 632-633).

The court below acted contrary to this procedure despite Petitioner's insistence to the contrary.

THE SECRET NATURE OF THE PROCEEDINGS FURTHER DENIED THE PETITIONER THE PROTECTION OF A PUBLIC HEARING IN CONTRAVENTION OF THE SIXTH AMENDMENT.

It may be said that systematically, attorneys within the jurisdiction of the Appellate Division of the Supreme Court of the State of New York, First Department, are not accorded a public trial.*

The place where the trial was conducted and the surroundings further degraded the nature of the said trial accounting for accumulative error. The State of New York has always declared that "the sittings within this state shall be public" with certain exceptions. (Judiciary Law, section 4 of McKinney's Consolidated Laws of New York, People

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* All of the hearings were held at the Supreme Court building in New York City but were held away from the court rooms on a floor where the judges' chambers were located. This area was not public in nature. To gain access to the room where the hearing was held, a participant was required to pass an attendant on guard and state the purpose of his visit.

There was nothing on the outside of the door to indicate that it was a courtroom of any sort and less inside the room for there was not one spare chair beyond those required for the Referee, official court reporter, one witness, Petitioner and Respondent's attorney.

v. Jelke, 1954, 308 N.Y. 56, 123 N.E. 2d 769, 48 A.L.R. 2d 1425, Civil Rights Law sec. 8. As amended L. 1923, eff. March 23, 1923. See also Morgan v. United States, 304 U.S. 1, 18-19, 58 S. Ct. 773, 776, 82 L. Ed. 1129).

The Referee, however, in a demonstrable lack of understanding of his judicial function and his responsibility and power as a judicial official took testimony of the principal complaining witnesses and admitted exhibits into evidence.

It is respectfully submitted that this was a marked abuse of discretion. Moreover, the absence of the Petitioner, meant the simultaneous absence of counsel, inasmuch as he was appearing pro se in the proceedings before the Referee (U.S.C., Amendment Fourteen).

That no court in a state would countenance such procedure in a hearing for Disorderly Conduct, an offense, apparently escaped the attention of the Referee.

CONCLUSION

FOR THE FOREGOING REASONS, THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

JOHN R. SANDERS
61 Hamilton Place
New York, N.Y. 10031

Pro Se

APPENDIX A

Referee's Report

SUPREME COURT

APPELLATE DIVISION—FIRST JUDICIAL DEPARTMENT

In the Matter

—of—

JOHN R. SANDERS,

An Attorney.

I, GEORGE TROSK, the Referee appointed herein by Order of this Court dated the 18 day of March, 1965 to take testimony with regard to the charges of professional misconduct against the above-named respondent, as set forth in the petition herein verified the 8th day of January, 1965, and to report the same with my opinion, respectfully report as follows:

Before entering upon the performance of my duties as referee herein, to wit, on April 23, 1965, I was duly sworn before Hon. Samuel M. Gold, one of the Justices of the Supreme Court of the State of New York.

Petitioner appeared herein by John G. Bonomi, Esq., its attorney, Raymond R. Whearty, Esq., of counsel; respondent appeared *pro se*.

Hearings were held on September 15, 1965, on June 9, September 14, October 18, November 3 and 23, December 19, 1966, and on January 10, 1967.

APPENDIS A

Petitioner's brief to the referee was received on February 21, 1967; respondent has not submitted any.

The Charges

The petition herein alleges that respondent has been guilty of

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"neglect; improper withdrawal of estate funds or, in the alternative, overreaching his client, the administratrix of the estate; misrepresentation; and aggravated failure to cooperate with petitioner's Committee on Grievances in a duly authorized investigation of his professional conduct, in violation of Section 90 of the Judiciary Law and Canons 21, 11, 22 and 29 of the Canons of Professional Ethics."

The specifications under the aforesaid allegation are set forth in four separately numbered charges, the allegations of which will be given in detail below, and which for the moment may be epitomized as follows:

Charge 1: Misfeasance and nonfeasance as attorney for an estate;

Charge 2: Misfeasance, and conversion of $800, the property of the estate;

Charge 3: Misrepresentation, to conceal from a client the non-performance of services respondent had been retained to perform;

Charge 4: Failure to cooperate with the Grievance Committee of the Bar Association.

(a) Was respondent's withdrawal of the $800 authorized by Mrs. Underdown;

(b) Did respondent fail to respond to the administratrix' requests that he forward to her the bank pass-book, cancelled checks and bank statements; did she then request the bank to send the data to her and, after receiving the bank statement, did she attempt, unsuccessfully, to obtain from the [26] respondent an explanation of the $800 withdrawal on April 2, 1959;

(c) did respondent visit the administratrix in Washington, D. C., in September 1962 and there state to her that he had encountered some difficulty and had used the $800, but had replaced it, and request her not to appear before the petitioner's Grievance Committee.

THE EVIDENCE

On October 31, 1957, Mrs. Underdown, as Administratrix of the Estate of Sylvester F. Bowman, deceased, accompanied by respondent, her attorney, opened an estate account in the Industrial Bank of Commerce with a deposit of $4270.30, the remaining proceeds of a sale that day of the estate's half interest in certain New York City real estate. Respondent took possession of the bank pass-book and directed the bank to send statements of the account and returned vouchers to him, at his office, Room 4107, 225 Broadway, New York, New York 10007.

At respondent's request, Mrs. Underdown then signed, in blank, and delivered to respondent, several checks drawn on the aforesaid estate bank account.

Committee to appear at the office of its counsel in connection with a complaint which the administratrix had registered with it. In September 1962, respondent visited the administratrix in Washington, stating to her that he had encountered some difficulty and had [25] used the $800, but had replaced it, and requesting her not to appear before petitioner's Grievance Committee.

THE ANSWER

Respondent's original answer, verified March 2, 1965, denied all the allegations in this Charge.

At the hearing held September 14, 1966, respondent orally admitted paragraphs 20, 21, 22 and 23 of the petition, and asked that the remaining paragraphs 24 to 32 be left "open".

At a later hearing, respondent orally denied paragraphs 24, 25, 26 and 32, and admitted paragraphs 27 to 31, inclusive.

His Amended Answer, verified October 28, 1966, expressly admits the allegations of paragraphs 20, 21, 22 and 23 of petition, and makes no reference, by way of admission, denial or otherwise, to any of the other allegations in this Charge.

At the hearing held January 10, 1967, respondent's attention was called to the fact that his Amended Answer, by failing to deny any of the allegations in this Charge, left all of them admitted. He said that had not been his intention, and that he would submit a revised Amended Answer, but he has not done so.

If, despite the foregoing, we treat as denied all the allegations of the charge which respondent had previously denied orally, the issues under this charge would be:

Thus was finally disclosed the true reason for respondent's delays, inaction and misfeasance. He would have done himself a service if he had frankly admitted it here, instead of trusting that the referee would not discover the fact by reading the minutes before the Grievance Committee, and fabricating one improvisation after another, in an effort to suit the occasion as it arose.

In my opinion this charge has been sustained.

[24]

CHARGE II. The petition alleges:

> By decree of the Surrogate's Court dated April 1, 1958, respondent was allowed $700 for counsel fees, $300 of which had been received by him in cash on January 25, 1957, upon the closing of the sale of the New York City property, and the remaining $400 of which he received by the use of one of the checks which the administratrix had signed and left with respondent; on April 2, 1959, without notice to the administratrix, and without approval of the Surrogate, respondent withdrew the further sum of $800 from the Estate account, using another of the aforesaid checks which the administratrix had left with him to pay estate and realty taxes. After having tried, without success, to get the bank pass-book, cancelled checks and bank statements from respondent, the administratrix, in August 1962, had the bank send them to her. The bank statement, when received by the administratrix, showed a withdrawal of $800 on April 2, 1959. She sought, unsuccessfully, to get from respondent an explanation concerning this withdrawal. On August 31, 1962, respondent redeposited $800 in the estate account, he having received, earlier in August 1962, but had not answered, two requests from petitioner's Grievance

whose turnings he was blissfully ignorant. Thus, when a member of the Grievance Committee taxed respondent with having, by the use of one of the signed blank checks Mrs. Underdown had entrusted to him, taken $800 in the guise of a fee, without court approval, respondent said that the $800 was for services to Mrs. Underdown individually, and not as administratrix. He was unable, there, or here, to point to any service he had performed or was to perform, for Mrs. Underdown individually: he admitted that she had no interest adverse to, or in conflict with, the interests of the estate; that all she could, or did, look for from the estate was the check which she, as administratrix, would hand herself, individually, as a distributee, just as she would do with respect to every other distributee. Moreover, if the $800 was for payment for services rendered to Mrs. Underdown individually, the Committee asked respondent by what right he made out an Estate check to himself in payment therefor. His answer was:

> "I have received checks of this type myself dozens and dozens of times. • • • I would say it is 99% of the practice."

Yet, in the next breath, when he was asked whether or not it was his normal practice to take whatever the Surrogate allowed him for his fee, and also to take a part of what his client received as an estate distributee, his answer was:

[23]

> "I can't answer yes or no. I don't practice in the Surrogate's Court. I practice 95% in the Criminal Court • • • I don't suppose I have had in my entire practice more than two or three Surrogate's matters."

dent, because of the alleged failure of other interested parties to "cooperate."

Lack of cooperation by interested parties is, of course, no excuse for failure of an attorney to take steps necessary to the prompt and efficient administration of an estate. One might suppose, listening to respondent's attempted avoidances, that he was oblivious of the fact that the Surragates Court is there for the very purpose of overcoming recalcitrance or lack of cooperation on the part of interested parties, making such orders and decrees as might be necessary by reason thereof, and that this would be none the less so, even if, as respondent claimed in partial explanation of his failure to seek such relief, he had, for a time, been unable to locate one of the distributees. The fact is that respondent knows his explanation and excuses are insufficient, as a matter of law, as appears from the following colloquy at a meeting of the Grievance Committee held May 16, 1963.

> "Mr. McClung: [one of the members of the Committee]: You seem to me to be a little taking the position that because the parties wouldn't agree here, there was nothing you could do. That really isn't so, is it?
>
> The Respondent: No sir, I don't mean to take that position. I have other matters to state along that line"—
>
> [22]

and again respondent went off on the same tack as before: his inability to get the other interested parties, or their attorneys, to agree on what should be done, or how.

The true reason for respondent's inaction and delays was, as he finally admitted, that at that time the Surrogate's Court was, to him, terra incognita, a labyrinth of

chaser—"I am working on that right now"—and, he said, it would then take "a week or two" to complete the deal with the proposed purchaser. At a later hearing, to wit, on June 13, 1963, respondent told the Committee he was still trying to get agreement among the interested parties about a sale and

> "I would say that within the next three, four, five days, very probably we will be able to distribute, in addition to that, transfer the property."

No application to sell the property has ever been presented to the Surrogate: again respondent attributes his failure to do so to the continued lack of "cooperation" by the interested parties or their attorneys.

Respondent admitted he had not given the Grievance Committee the reasons he gave here for not applying for approval of the sale "in the detail I am doing it now. I just wasn't as thorough * * * that's all I can say."

For all that appears, the Saratoga property is gone; the estate has received nothing for its interest therein, and apparently it never will.

In Surrogate DeFalco's decree on the Intermediate Accounting, he sustained objections to certain reported re-

[21]

ceipts of income and disbursements in reference to the real estate, and directed the administratrix

> "to proceed to account to the objectant for all receipts, income and expenses in connection with the said two properties."

That was on April 1, 1958, and still there has been no final accounting or distribution—again, according to respon-

proposed purchaser's checks remained with respondent, the sale was not consummated.

Respondent's second excuse for the failure to take steps to effect a sale of the Saratoga property between the Surrogate's direction to do so in 1958 and his listing of the property with a broker in 1962, boils down, as does his excuse for his other delays and inaction, to his assertion that he was unable to get the necessary "cooperation" from Harry's estate and the other parties interested in the property, i.e., four nieces besides Mrs. Underdown and two nephews, all of whom were of full age and sound mind. This alleged lack of cooperation consisted, according to respondent, of their failure to attend conferences to discuss estate problems, or to agree on what should be done about them, or how. For example, said respondent, this lack of cooperation left the two estates, Harry's and Sylvester's, at odds as to which of them was responsible for the payment of taxes on the Saratoga property, and while they continued to fail to agree, the taxes remained unpaid and the arrearages were permitted to pile up, until the City of Saratoga finally stepped in and sold the property for unpaid taxes—of which Mrs. Underdown was not informed until much later. The purchaser at the tax sale was the same individual as the one to whom respondent had previously contracted to sell the property for $2500, and it was

[20]

reported, subsequently, that he was still willing to pay that amount, less the taxes he had paid at the tax sale, for a deed.

At a hearing before the Grievance Committee on May 16, 1963, respondent testified that he was then in the process of applying to the Surrogates Court for approval of the sale of the Saratoga property to the former proposed pur-

a will in which he gave his widow, Margaret, a life estate therein and that, consequently, she was entitled to remain therein. In a petition made in 1957, respondent had pointed out that Margaret had elected to take against the will. However, he said, there had been no effort to sell the Saratoga property because the parties interested in the estate did not want to sell the property over Margaret's head. If respondent had kept himself informed as to what was going on with respect to this relatively substantial asset of the estate, he would have known that there was no reason, on that ground, to delay efforts to sell: he would have known that Margaret had been dead for three years before he learned of her death, as he did from Mrs. Underdown, in the following circumstances. Without Mrs. Underdown's knowledge, respondent had entered into a contract to sell the Saratoga property subject to Court approval, for $2500. When Mrs. Underdown learned of this, she tried and tried, without success, to get respondent to respond to her attempts to communicate with him about the value of the property, which she felt was in excess of $2500. Failing in her efforts to reach respondent, Mrs. Underdown went to Saratoga to inspect the property, and there she learned that Margaret Bowman had been dead

[19]

three years, and that others had been in possession of the property for two. On her return from Saratoga, Mrs. Underdown apprised respondent of these facts, theretofore unknown to him.

Respondent had received two checks, aggregating $2500, from his proposed purchaser, but had not deposited them; he never sought Court approval of his proposed sale; Mrs. Underdown repudiated the transaction, and although the

assets until it developed, in the course of the administration of the estate of his brother Harry, that Sylvester had a half interest in two pieces of real estate, one in New York City and the other in the City of Saratoga, which were involved in the Harry Bowman estate.

The only assets of Sylvester's estate were his half-interests in the aforesaid two pieces of real estate. The combined appraised value of these two half-interests was $7250.

The New York City property was sold on October 31, 1957 for $11,000. After deducting adjustments made at the closing, and the payment out of cash received at the sale of a fee of $300 to respondent, the estate was left with $4270.

From the closing, respondent and Mrs. Underdown repaired to the Industrial Bank of Commerce, 56 East 42nd Street, New York City, where respondent caused an account to be opened in the name "Estate of Sylvester F. Bowman, deceased, Helen Bowman Underdown, Executrix, c/o John R. Sanders, Room 4107, 225 Broadway, New York 7, N. Y." and the $4270 was deposited therein.

In a Decree dated April 1, 1958, made by Surrogate DeFalco on an Intermediate Accounting, the administratrix was directed "to take such steps as may be necessary

[18]

to sell the decedent's interest in the property located in Saratoga Springs." Respondent then procured an appraisal of the property, which gave the value at $4,000.

Respondent waited about four years, i.e., until 1962, to list the property with a broker for sale.

Respondent gave two reasons for the delay.

Respondent's first reason was that Harry Bowman, who died the owner of a half interest in the property, had left

involved in Charge II, which charges respondent with conversion of estate funds by the use of the proceeds of this check.

(Par. 8):

Did respondent fail to comply with Mrs. Underdown's requests from time to time that he advise her of the use made of said blank checks, and that he send her the pass-book, cancelled checks and bank statements;

(Par. 13):

Did Mrs. Underdown ascertain, subsequent to about May 8, 1963, that the City of Saratoga Springs had taken title to the Saratoga property for non-payment of taxes, although she had delivered signed, blank checks to respondent in or about January, 1957 for the purpose of paying them.

Respondent admits the receipt of the checks and the sale of the property for non-payment of taxes. Here again, as in reference to the issue under paragraph 7, the denial raises only the question of whether or not the checks were given to him for use only in the payment of taxes.

[17]

THE EVIDENCE

On March 28, 1955, Helen Bowman Underdown (Mrs. Underdown), a resident and domiciliary of Washington, D. C., was appointed administratrix of the estate of her uncle, Sylvester F. Bowman, who had died on May 19, 1951, a resident of New York County.

The delay in Mrs. Underdown's appointment was due to the fact that the decedent was not known to have left any

13, 1966. In that amended answer, respondent expressly admits some allegations he had orally admitted at the September 14th hearing, and makes no reference—he neither admits, denies or otherwise alludes to—any of the other allegations of the petition on this charge.

At a later hearing, after some colloquy about the unsatisfactory state of the pleadings, respondent, either categorically or in effect, orally admitted various additional paragraphs of the petition, and denied paragraphs 7, 8 and 13. When his attention was called to the fact that his oral denial of paragraphs 7, 8 and 13 was inconsistent with his written, amended answer of October 28, 1966, which, by failure to deny, admitted all the allegations of the petition, respondent said he would submit a revised amended answer "sometime this week". No revised amended answer has been interposed.

Strictly speaking, therefore, all the allegations of Charge 1 stand admitted. However, if we were to give respondent the benefit of the doubt, and treat paragraphs 7, 8 and 13 as denied, the issues under this charge would be:

[16]

(Par. 7):

Were the signed, blank estate checks which the administratrix delivered to respondent about the time the estate account was opened "to be used for payment of estate and realty taxes";

Respondent admits receiving the checks; the denial raises only the question: was he to use them solely to pay taxes, or was he also authorized to fill out one of them to his own order, for $800, allegedly in payment of a fee due him. This contention is

APPENDIX A

In respondent's original answer, verified March 2, 1965, he "denies each and every allegation" in the paragraphs of the petition containing this charge.

At the hearing of September 14, 1966, after respondent conceded that testimony and documents previously introduced showed that many of the allegations of the petition which he had denied in his answer were incontrovertibly true, he stated that he had been pressed to get his answer in on time; that he had had "no opportunity to analyze the petition and properly answer it, as I would have liked" and that it was his intention, and he would, amend his answer "to conform with the truth of the matters which will be adduced upon the record."

Inasmuch as such a course, if followed, would have resulted in the continuing of the hearings with the issues left undefined pending the submission of an amended answer, respondent was requested to state his position orally in the meantime, and thereupon, for the record, he admitted the

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allegations of Charge 1 contained in paragraphs 1, 2, 3, 4, 5, 6, 9, 11, 14 and 15 of the petition; he denied part of paragraph 7, denied knowledge or information as to paragraph 8 and asked that the remaining allegations of this charge—paragraphs 10, 12, 13 and 16 to 20 be left "open".

At the hearing of October 18, 1966, respondent stated that, in order that petitioner's counsel would have an opportunity to see respondent's amended answer in advance of the next session, respondent would serve it "at least a day or two before the next hearing", which had therefore been set for November 3, 1966. Although the amended answer was verified by respondent on October 28th, 1960, he did not present it, or give a copy of it to petitioner's counsel until in the midst of the afternoon session on November

time the aforesaid bank-account was opened in 1957, the administratrix, at respondent's request, had signed in blank and delivered to respondent checks to be used in paying the realty taxes, they were not paid, and the City of Saratoga took title to the property in 1960 for non-payment of taxes. In May 1963 the former prospective purchaser of the Saratoga property from the estate bought it from the City of Saratoga at a tax sale.

At a hearing before petitioner's Grievance Committee on May 16, 1963, respondent testified that he was then in the process of applying to the Surrogates Court for approval of the sale of the Saratoga property pursuant to the aforesaid May 8, 1963 contract, and that he would make partial distribution immediately; on June 13, 1963 respondent represented to petitioner's Committee on Grievances that such an application was pro-

[14]

gressing, and he estimated it would be concluded in the next several days; on April 16, 1964, respondent represented to the Committee that said purchaser was agreeable to paying the contract price for the property, less the amount of taxes paid; that in fact respondent made no partial distribution until November 1963, and up to the time of the conclusion of the hearings before the Grievance Committee on April 16, 1964, respondent had not applied to the Surrogate's Court for approval of the sale.

THE ANSWER

In view of the way respondent has dealt with this Charge, his answers should be described at length.

in the Industrial Bank of Commerce in the name of "Estate of Sylvester F. Bowman, deceased, Helen Bowman Underdown, Executrix, c/o John R. Sanders, Room 4107, 225 Broadway, New York 7, N. Y." Respondent retained the bank pass-book for said account, and failed to comply with the administratrix' requests from time to time for advice as to the use respondent had made of several checks which, at the time of the opening of the account, the administratrix had signed in blank, and delivered to respondent at his request for use in paying estate and realty taxes; respondent also failed to comply with the administratrix' requests from time to time to send her the pass book, cancelled checks and bank statements; in 1962 the administratrix instructed the bank to send said data to her. No partial distribution of the proceeds of said sale has been made, respondent taking the position that no distribution could be made pending the disposition of the Saratoga property, hereinafter referred to.

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The decedent also left a one-half interest in certain real property in Saratoga, New York which, by order made in February, 1958, the Surrogate directed the administratrix to take the necessary steps to sell; respondent thereupon procured an appraisal of the property, but failed to list it for sale with a broker until 1962; on or about May 8, 1963, a prospective purchaser signed a contract to buy the property for $2500, subject to approval by the Surrogate's Court, and delivered to respondent checks representing the full purchase price; respondent did not deposit said checks and did not seek court approval of the sale. Although, at the

Underdowns had given and with the documents introduced during their testimony, and he gave his own version of the incidents in reference to which the Underdowns had testified.

Granting that a respondent in a disciplinary proceeding is entitled to reasonable notice of hearing and a reasonable opportunity to confront and examine the witnesses against him [Matter of Eldridge, 82 NY 162, 167 (1880), but see Matter of Young, 284 App Div 406 (1st Dept. 1954)], he may not, after receiving such notice, impede or frustrate the proceeding by walking away from the hearing on the ground that he has another engagement—particularly when such engagement is not entitled to precedence over the one in this court, and the hearing is held on a date to which it had been adjourned five weeks previously at his own request, and on which, in consideration of the adjournment granted him, he had solemnly promised that he would proceed, whether or not such other engagement had previously been concluded.

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In the foregoing circumstances, it is submitted, the referee did not abuse his discretion by taking testimony from the Underdowns on June 9, 1966 (See Matter of Case, 24 App. Div. 2d 797; 3rd Dept. 1965).

CHARGE 1: The petition alleges:

> On January 25, 1957, respondent, as attorney for Helen Bowman Underdown, of Washington, D. C., the administratrix of the estate of Sylvester F. Bowman, deceased, received $4,570.30, being the net proceeds of the sale of the decedent's interest in a parcel of real property in New York City; on the same day, respondent deposited these proceeds in an account then opened

ing the transcript, respondent wanted to cross-examine the Underdowns, a time convenient to all would be fixed, and the Underdowns would then come back for that purpose, provided respondent sent them the money to cover their expenses.

Although respondent declared, referring to his agreement to proceed on June 9th:

> "I am certainly bound by any agreement, I made. I am not trying to avoid that"—

he asked to be "excused", and when the referee declined to "excuse" him, he took an "exception" and left the hearing.

The Underdowns were then examined on direct by counsel for petitioner, Mrs. Underdown for forty-seven pages and Mr. Underdown for six.

Two weeks before October 18, 1966, the date of the next [11] session, respondent, as he admits, received notice that the minutes of the September 15th hearing, and all the exhibits introduced thereat, were available to him at the Committee's office. However, he did not look at them; as he stated at the October 18th hearing: "I have prepared myself otherwise * * * I didn't think I would need them."

At a hearing held November 3, 1966, the Underdowns were back. Respondent, after first reserving all his "rights" conducted a cross-examination of Mrs. Underdown which covers upwards of a hundred pages of the minutes and a re-cross for five more; his cross-examination of Mr. Underdown covers two pages.

In the testimony given by respondent on his own direct examination, he dealt at length with the testimony the

respondent claimed, at the June 9th session, had intervened since May 3rd to disable him from carrying out the agreement he made that day to proceed on June 9th, and could well justify the conclusion that at the time respondent made that agreement he intended not to perform it.

It was not until June 8th, the day before hearing scheduled for the 9th, that respondent told counsel for petitioner that respondent would not proceed on the 9th although, if the reasons he gave on the 9th be true, he must have known well in advance of the 9th that he would not proceed on that day. In the meantime petitioner, having no reason to suppose that the hearing set forth the 9th would not proceed, as scheduled, had sent the Underdowns the money to cover their travel and hotel expenses—respondent having again failed to carry out his undertaking to do so—and they were here, outside the hearing room, waiting to be called.

It was in the light of the foregoing and the fact that,

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irrespective of any question of fault, no testimony had yet been taken although upwards of a year had elapsed since the Order of Reference, that the referee announced to respondent on June 9th that the hearing would not be adjourned; that the Underdowns would not be required to come back a third time; and that it was up to respondent to decide whether or not he would abandon the hearing.

Nevertheless, the referee also stated that if respondent did not remain, any testimony taken, and any exhibits received in his absence, would be taken and received subject to his right to object, and that he would be given the opportunity in ample time prior to the next hearing—as, in fact he was—to read the transcript of the testimony and the exhibits to enable him to make any such objections at the next hearing; further, that if, after read-

counsel for the Grievance Committee prepared one and, on May 4th, 1966 sent it to respondent in triplicate with a letter of transmittal requesting respondent to sign and return two copies of the stipulation.

The said stipulation contained the following provisions as to what had been agreed upon before Mr. Justice Breitel:

> "5. In the event a hearing herein is scheduled to be held June 9, 1966, and on any continued dates thereafter, respondent is to attend said hearing or hearings, notwithstanding the said criminal prosecution entitled *United States* v. *Aiken et al.* may be then still in progress.
>
> "6. No further adjournments herein will be granted unless application therefore is addressed to the Referee and the same is granted by him."

[9]

The letter transmitting the stipulations to respondent was to the same effect as the stipulation and, in addition, contained this sentence:

> "You will recall that Judge Breitel referred to the date June 9th, which you selected, as a 'copper-clad' date for hearing."

Respondent admits that he received the aforesaid letter and the stipulation which accompanied it, and that he did not sign and return the stipulation. He admits the stipulation accurately recorded the agreement he made before Mr. Justice Breitel; his reason for not signing and returning it, as he admits he expressed it to petitioner's counsel when the latter asked him why he did not do so, was: "I do not want to hang myself." This was before the events which

would be concluded before June 9th, but that because of the illness of jurors, and deaths in the families of jurors, in that case, it had been necessary to take recesses which delayed the trial; that he was, therefore, not ready to go on, and he requested an adjournment.

The foregoing request had to be considered in the light of (1) what had occurred at the May 3rd conference before Mr. Justice Breitel, as the result of which the May 4th hearing had been postponed to June 9th, and (2) the fact that the Underdowns had again come on from Washington, D. C. and were in the corridor outside the hearing room, waiting to testify.

At the May 3rd conference, the question whether or not the May 4th hearing should be adjourned and, if so, to

[8]

what date, was debated and it was finally agreed that it should be adjourned to June 9th, a date selected by respondent, on the distinct agreement by respondent that he would proceed herein on June 9th, whether or not U. S. v. Aiken had previously been concluded, subject only to an earlier hearing herein of the Aiken case should finish in time to have a hearing herein prior to June 9th.

The minutes herein record the following colloquy at a later hearing held herein:

> The Referee: Was it the agreement [before Mr. Justice Breitel on May 3rd] that you were to go on here [on June 9th] whether or not your Federal case had been completed?
>
> Mr. Sanders: That is true, Sir."

Mr. Justice Breitel having said that the arrangement made before him should be put into a written stipulation,

respondent had failed to honor his commitment to send the Underdowns their expenses, and had failed to respect communications in reference thereto.

On May 3, 1966 Mr. Justice Breitel held a conference with respondent and counsel for petitioner in reference to a proposed order presented by respondent, requiring petitioner to show cause why the May 4, 1966 hearing should not be stayed. The parties, with Mr. Justice Breitel's assistance, and in his presence, came to an agreement by which the May 4th hearing was cancelled, on the faith of certain commitments—hereinafter described—then made by respondent with reference to his attendance on an adjourned date.

[7]

In accordance with the aforesaid agreement, notice was duly given to respondent of a hearing to be held on June 9, 1966. On that day respondent appeared; his opening statement was: "I am here and I am not here"—and he then went on to say that he was, and for about a month had been, actually on trial in the United States District Court in the case of United States against Aiken, et al., in which he represented Leroy Davis, one of the defendants; that the "nexus" of the case then involved his client, and, if the government finished its direct case, respondent would have to cross-examine within the next half-hour or thereabouts; that he would be in contempt if he failed to appear there at 10:15 AM, and that he desired, and believed it was his right, to be "confronted" by the petitioner's witnesses.

Respondent then stated that when, at the May 3rd conference with Mr. Justice Breitel, he had suggested, and agreed on, June 9th as the adjourned date, he had expected that the trial of U. S. v. Davis, which he had then been in,

attend the hearing. In addition, the notice of the March 3rd hearing stated—as the referee requested it should—that the referee directed respondent to advise the referee whether or not respondent had complied with the undertaking to send the Underdowns the money to cover their expenses. Respondent did not respond to that direction.

The aforesaid hearings scheduled for October 14, December 7 and March 3, 1966 were not held, Mrs. Underdown having, after the hearing of September 15th, suffered an accident which disabled her from coming to New York on those days.

On April 7, 1966 respondent was served with Notice that the hearing would proceed on May 4, 1966; on April 14,

[6]

1966 petitioner wrote respondent reminding him that the hearing set for May 4th was an engagement of the Appellate Division, which would take precedence over others, and of his obligation to send the Underdowns the money to cover their travel and hotel expenses.

On April 29, 1966 the referee received from respondent a telegram stating that "due to no fault on my part", the case of United States against Leroy Davis had been marked "ready for trial this week and assigned to a United States District Judge for Monday, May 22, 1966, so that I am actually engaged on trial and unfortunately will be unable to appear in my matter. Therefore, I must, under the circumstances, request an adjournment."

At the referee's direction, petitioner thereupon wrote respondent that his application for an adjournment had been denied; that the hearing would proceed on May 4th, 1966, as scheduled. In that letter, petitioner also notified respondent that on May 4, 1966 petitioner would move to amend its petition to include the additional charges that

respondent admitted he had not done—and that there were two witnesses who had come from Washington, D. C. to testify that morning, as respondent had been informed they would be, and that they were then outside, waiting to be called.

After some colloquy, and with a view to accommodating respondent if possible, the referee had the two witnesses come into the hearing room and explained respondent's situation to them; they were told that respondent had agreed—as he had before they came in—that if they would return on another day, he would pay their traveling expenses in coming to and returning from the hearing, and their hotel expenses while here to testify, as petitioner had [5]
done for the hearing that day, and they were asked whether or not they would be willing to come back on another day on these conditions.

The witnesses stated they would be willing to do so.

Respondent requested the adjournment be for a month, i.e., to October 14; by that time, he said, he would have finished the case he was in, and would have had time, thereafter, to prepare for a hearing herein on the 14th. The matter was thereupon adjourned to October 14, 1965, expressly in reliance on respondent's representation that he would send the Underdowns the money to cover their expenses.

Following the last mentioned session, hearings were scheduled for three successive dates, i.e., October 14, December 7 and March 3. In each of the notices sent to respondent of these hearings he was reminded that the hearing would take precedence over other engagements, and of his obligation to send the Underdowns the money for their travel and hotel expenses in coming to New York to

hearing set for the 15th, stating that he was engaged in a trial—he was about to pick a jury—in a case before Mr. Justice Saypol, and was scheduled, upon the conclusion thereof, to commence another trial before Mr. Justice Postal. Petitioner's counsel pointed out to respondent that he had received approximately a month's notice of the September 15th hearing, which respondent admitted; that the hearing herein, being a matter before the Appellate Division, took precedence over a trial at Trial Term; that in the circumstances respondent was not entitled to proceed

[4]

in the case he was then in, or in the one to follow, and he would be expected to proceed on the 15th. Respondent said he would file an affidavit of engagement.

No further communication, written or oral, was received from respondent by either counsel for petitioner or the referee until, at 10:35 AM on September 15th—a Wednesday—respondent entered the hearing room and stated he had been "held up" at a Calendar Call in the Civil Court—obviously, in neither of the Supreme Court cases to which he had referred in his conversation with petitioner's attorney on the 13th—and that he would not say he had been "forced" on trial in the case before Mr. Justice Saypol, but he had been "technically" on trial since the preceding Thursday, inasmuch as one juror had then been sworn, and since then the rest of the jury had been impanelled; that the first witness was about to be sworn, and the trial would, in respondent's opinion, continue "for a period of possibly two weeks."

Respondent was "trial counsel", not the attorney of record, in the case before Mr. Justice Saypol.

The referee pointed out to respondent that he should have informed Mr. Justice Saypol of the situation—which

APPENDIX A

Respondent's Reservation of "Rights"

Before discussing the charges and the evidence, it is appropriate to note that some of the testimony of Mrs. Underdown, the complainant in Charges 1 and 2, and of her husband, was received over respondent's objection after he had left the hearing, and that later, before commencing to participate in the taking of testimony at the hearings and cross-
[3]
examining the Underdowns, respondent noted on the record that his presence

> "does not constitute a waiver of my objections heretofore raised as to the right to be confronted by the witness Helen Underdown and her husband, to raise objections to any questions asked, make proper motions and to cross-examine those particular witnesses."

This presents the question whether or not, in the circumstances of this case, the referee abused his discretion in taking testimony from the Underdowns in respondent's absence. On this question, the following are the pertinent, material facts.

Notice of a hearing to be held at 10 AM on September 15, 1965 was duly given to respondent personally and by mail.

On September 9, 1965 respondent was informed, in writing, that witnesses were being brought by petitioner from Washington, D. C. to testify at the hearing to be held on the 15th and "In the circumstances you will be expected to be ready to proceed."

In a meeting between respondent and counsel for petitioner in a corridor of the Criminal Courts Building on September 13, respondent requested an adjournment of the

Thereafter, on numerous occasions, Mrs. Underdown tried, by letter and by telephone, to get from respondent a statement of the condition of the bank account, but he did not answer her letters and she was never able to make personal contact with him. Finally, on August 11, 1962, [27] almost five years after the account had been opened, Mrs. Underdown, still in ignorance of what had been going on in the account, wrote the bank, inquiring as to the "status of the account" and requesting the bank to send bank statements and returned vouchers to her, at her address in Washington, D. C.

Without waiting for the receipt of the bank statement, and on August 12, 1962, Mrs. Underdown wrote the Grievance Committee, complaining that respondent had failed to make distribution of the proceeds of the sale of the New York City real estate, received in January 1957, and of his failure to respond to her numerous communications to him.

On August 17, 1962 the Grievance Committee wrote respondent that it had received from Mrs. Underdown a "complaint of neglect" by him, and requesting him to call at the Committee's office on August 31, 1962.

When Mrs. Underdown received the bank statement, she noted that on one occasion $400, and on another, $800, had been withdrawn from the account.

On August 31, 1962 respondent restored $800 to the estate account.

In September, 1962, respondent appeared, unannounced, at the Underdown home in Washington, D. C. and had a conversation with Mrs. Underdown, at which her husband was present. Respondent explained that the $400 withdrawal had been made by his use of one of the signed, blank checks which Mrs. Underdown had left with him: it was

the balance, after crediting the $300 he had received at the closing, of an allowance of $700 which the Surrogate had made to him for his fees upon an intermediate accounting in 1958.

[28]

None of the foregoing is in dispute.

With respect to the $800 check, the evidence is conflicting, and will be discussed below.

Respondent admits that the $800 check was one of the blank checks Mrs. Underdown had signed and left with him at the time the bank account was opened; that he filled it in for $800, making it to his own order. He claimed that he was authorized to do so under a retainer agreement Mrs. Underdown had made with him in his office in 1957.

After first saying that he could not recall the 1957 retainer conversation, respondent testified that in that conversation it was "definitely discussed" that he would apply to the Surrogate for a fee, and that the blank checks left with him were to "cover any and all expenses, whether they be taxes, water, fee or what have you." He had previously told the Grievance Committee that these checks had been left with him for use "in case of an emergency."

Respondent said, also, that he had a written "fee agreement" with Mrs. Underdown for one-half of whatever she would get from the estate for representing her, individually, plus whatever allowance the Surrogate would give the estate, and that when he drew the $800 he "considered" himself "covered" by that agreement. This taking of a fee, it should be noted, was without application to the Surrogate, and would be in violation, even of respondent's own description of his alleged retainer agreement, by which, he said, he was to apply to the Surrogate for his fee.

Elsewhere, respondent relied on an alleged written retainer agreement which he said Mrs. Underdown had made, [29] not with respondent, but with Mr. Baker, with whom respondent had been associated until Mr. Baker's elevation to the Bench, at which time respondent succeeded Judge Baker, as attorney.

Respondent was quite specific about the terms of that alleged retainer; he said he had read it, and, according to its terms Mr. Baker was to get one-half of anything that came into the estate, plus one-half of anything Mrs. Underdown got out of it:

> "if the estate got $5,000, Mr. Baker would get $2500 of that * * * and if, out of that [$5000] Mrs. Underdown got $1250, he would get half of that."

Respondent attempted to mitigate his taking of the $800 without the Surrogate's approval, by asserting that the $800 represented not only what was coming to him for the estate, but also what Mrs. Underdown owed him for services rendered to her, individually. He said, however, that he had not attempted to allocate how much was for services for her, individually, and how much was for services to the estate.

Respondent, when before the Grievance Committee, and likewise here, was unable to identify any service which had been performed or was to be performed for Mrs. Underdown individually; he admitted there was no conflict of interest between her, individually, and the estate, and that all she expected individually was the check which she, as administratrix, would issue to herself, as a distributee, upon distribution of the estate, just as she would then issue checks, as administratrix, to other distributees.

Respondent testified that when he called on Mrs. Underdown in Washington in September 1962, she said she remembered "vaguely" signing a retainer; that the only question in her mind was whether it was for one-half or [30]
one-third; that he told her to look for her copy and he would try to find his, and "In the meantime, I will return the $800 to the account" and she could repay him "when the estate was wound up, if she agreed."

Respondent has not produced any written retainer agreement by Mrs. Underdown with either him or Mr. Baker, and she denies there ever was one.

Respondent testified that as the result of "burglaries, thefts, larcenies and evictions" of which he had been the victim, the written retainer has "disappeared". He testified that Mr. Baker's secretary might recall the terms of the retainer, and one hearing was adjourned to enable him to try to locate her, and when, on January 10, 1967, the hearings were closed, it was with the expressed understanding that if respondent located her at any time before the referee filed his report, the hearings would be reopened to receive her testimony. There has been no further word from respondent.

I put no stock in respondent's assertion that he thought Mr. Baker's secretary might help him establish the existence of the retainer. If respondent's testimony be true he knew, when he left Mrs. Underdown in September 1962, that it would be important for him to establish that, by the terms of the retainer, he was entitled to take the $800; he left her with the statement that, when he got back to New York, he would search for it. Obviously he did not find it. He must have realized then the importance of locating proof of its terms; the importance of doing so was fur-

ther impressed on him in May 1963, when he received the Committee's charge letter, and if he was not fully aware of it, even then, he certainly learned it during the hearings before the Committee commencing shortly thereafter.

In these circumstances it is inconceivable that he would have waited until the hearings before the referee were almost over to start trying to locate Mr. Baker's secretary.

[31]

The Saratoga property having been taken by the City of Saratoga for non-payment of taxes, the only asset on which the estate could, or did, realize anything was the New York City property. Under the terms of the retainer agreement, which respondent testified Mrs. Underdown had made with Mr. Baker, he would have received one-half of the $4570.30 which the estate received, net, for the New York City property, i.e., $2285.15, and the distributees would share what was left of the remaining $2285.15. The record does not show the per stirpital shares of the distributees—five nieces and two nephews—but the testimony is that Mrs. Underdown has received $812.73. On that basis, Mr. Baker would have been entitled to receive, from Mrs. Underdown, an additional $406.36, making his total $2691.51; Mrs. Underdown would have been left with $406.36, and each of the other six distributees, assuming they shared the remaining $1472.42 ($2285.15 — $812.73) equally, would receive $245.40.

As far as respondent is concerned, he received $700 by Court allowance and he claims he was entitled to the $800 he got through the medium of the blank check he filled in—a total of $1500; as against which the Underdowns got $812.73, and each of the other six distributees, assuming they would share the remaining $3757.57 equally, would

receive $626.20. A retainer agreement by an estate attorney which would work out in such fashion would be invalid, and no Surrogate would permit it to be enforced (In re Gasco, App. Div. 2nd, Dec. 1966; 275 N. Y. S. 2d, 871 n.o.r.; Re Young, Surr. Suff. Co. Dec. 1966; 275 N. Y. S. 2d 897, n.o.r.).

Mrs. Underdown testified that one of the other parties interested in the estate advised her to retain Mr. Baker; [32] that she retained Mr. Baker by telephone, she being in Washington and he here; that she has never met Mr. Baker, and that she never had any agreement with him, written or oral, for the payment of any specified amount or percentage; that when Mr. Baker was elevated to the Bench, respondent took over "as is", and there was never any conversation between them as to fees.

Mrs. Underdown's attention was called to the fact that according to the minutes of her testimony before the Grievance Committee, she testified there that Mr. Baker's fee was to be one-third of what she got. Mrs. Underdown testified here that she did not intend to say that; that her appearance before the Committee was her first experience at a hearing, and she was "confused and nervous" and "upset"; that her arrangement with Mr. Baker was that he was to get a "percentage", but "At no time did we agree to one-third or one-half or one-fourth or anything"; that no "percentage" had been stipulated, they never got down to "fractions", because Mr. Baker said that they did not know the worth of the estate, what taxes they would have to pay, or what she would receive; it was her idea that when the time came to make out a bill, Mr. Baker would get "his natural allowed amount."

Mrs. Underdown testified that there was no conversation with respondent about representing her in any capacity other than as administratrix, and she never understood that he did.

Mrs. Underdown testified that respondent told her that the checks she signed in blank—like respondent, she first thought, but she was not positive, there had been three, whereas there had been five, two of which were never used [33] —were to be used for the payment of taxes, and there was no conversation about using any of them for the payment of fees.

Mrs. Underdown testified that she never authorized the drawing of the $800 check, and that she did not learn of the withdrawal until, in response to her request, she received the Bank's letter of August 21, 1962, transmitting the statement of the estate account. This is corroborated by Mrs. Underdown's letter of August 15, 1962, to the Grievance Committee, in which she complained of respondent's failure to distribute the proceeds of the sale of the New York City property, received in 1957, and his failure to answer her letters, although he was "paid" a retainer's fee of $300 of the Estate money", but makes no mention of his having received an additional $800—which, of course, she would have referred to in her complaint if she had known of it. This also refutes respondent's "belief" that he told Mrs. Underdown, not "specifically", but "in a general way", that he was going to draw the check.

Mrs. Underdown testified that when respondent came to her home in Washington, there was no reference to fees and the $800 check was not discussed; that respondent told her he had been in "some difficulty", and had used the

money. Respondent's testimony that on that occasion he said that, in view of the difference of opinion between them about the $800 withdrawal: "I will return the $800 to the account", is demonstrably untrue: the bank statement shows that he had already returned it—the deposit was made on August 31, 1962, which was after respondent had been informed by the Grievance Committee of the receipt of a complaint from Mrs. Underdown, but prior to respondent's visit to Washington, which was not until Sep- [33a]
tember, 1962. Respondent's concern on that occasion was to get Mrs. Underdown to withdraw her complaint to the Grievance Committee: he said if she would not appear before the Committee he would return the $700 in fees which he had received.

Mrs. Underdown was corroborated by her husband, who heard her end of her telephone conversation with Mr. Baker at the time of his retainer, who accompanied Mrs. Underdown on all her visits to New York in reference to this matter, and who was present at the interview with respondent at their home in Washington.

Mrs. Underdown impressed me as a frank, straightforward and truthful witness, with an excellent memory, and I would have believed her in preference to respondent, whose veracity left much to be desired, even if she had not been corroborated by her husband, who also impressed me as entirely credible.

I am convinced that there never was a retainer, written or oral, by which Mrs. Underdown agreed to pay Mr. Baker, or after him, respondent, any specified fraction or percentage of the amount of the estate, or of what Mrs. Underdown would receive therefrom; that respondent

was not authorized, or entitled, to use, for the payment of his fee, any of the signed blank checks which Mrs. Underdown left with him; that he never told Mrs. Underdown that he intended to use, and she never authorized him to use, any of those checks for the payment of a fee to himself; that his drawing of the $800, and his using the proceeds thereof, were improper, and that his testimony to the contrary of the foregoing was knowingly untrue.

In my opinion this Charge has been established.

[34]

CHARGE III. The Petition alleges:

> Respondent was retained by Top Hall Social Club in August 1962 to procure its incorporation; in October, 1962, respondent prepared and delivered to the president of the club a letter stating:
>
> > "This is to inform you that the approval of your corporation (stock) is in the hands of the undersigned and you are competent to operate under a charter and certificate of incorporation"—
>
> whereas, in fact, the club's Certificate of Incorporation was not issued until, and was dated, June 12, 1963.

THE ANSWER:

All the allegations of this charge were denied in respondent's verified answer. In his amended answer, they are all admitted, by failure to deny.

Respondent's failure to undertake to revise his amended answer on this charge, as he did on the others, stems from the fact that, by the time his attention was called to the state of the pleadings, the president of the club had al-

ready testified and respondent seemed content to let the matter stand that way.

THE EVIDENCE

Respondent admits that on or about August 9, 1962, he was retained, and was paid a fee, to procure a Certificate of Incorporation for a group who called themselves "Top Hat Social Club", and that on October 30, 1962, respondent wrote, and signed, a letter to Nathaniel Sligh, the president of the club, in which respondent said:

[35]

"This is to inform you that the approval of your Corporation (stock) is in the hands of the undersigned and you are competent to operate under a charter and Certificate of Incorporation.

Though we did experience some difficulty in obtaining same, requiring me to appear in Albany twice * * * we were finally successful."

The letter then referred to the need of a meeting to discuss the "corporate outfit" which would be needed, following the obtaining of which there would be a "formal meeting for the very serious purpose of corporate organization."

Sligh testified that he told respondent that members of the club were complaining about the delay in getting the charter; that they were giving Sligh a "hard time", and that respondent wrote the letter in response to Sligh's request that respondent give him something "to get the fellows off my back."

The letter was completely false: the Certificate of Incorporation had not been issued and, in fact, was not issued until about eight months later, i.e., on June 12, 1963.

Both respondent and Sligh testified that the delay had been caused, in part, by the unavailability of several successive names which club owners had suggested, and by the illness of respondent's wife. It is difficult to believe that inability to find an available name, and respondent's wife's illness, could have caused a delay of about ten months from the time of retainer to the time of getting the Certificate, and it is clear that Sligh, despite his testimony, knew that there was no adequate excuse for the delay. Thus, as late as March 14, 1963, Sligh, as president of the club, joined [36] with DuBois, the Secretary, in a letter to respondent in which, in the name of the club, they wrote:

> "We have grown tired of waiting to hear from you pertaining to the charter that you were to obtain for us * * * you have failed to at least notify us as to the progress you have made."

and the letter stated, further, that unless respondent sent the charter within seven days from the receipt of the letter, which was sent by certified mail, the club would take

> "some form of legal action."

If, in fact, the delay had been caused by the reasons testified to by respondent and Sligh, no one would have known of them better than the members of the club themselves, and there would have been no need to give a false reason to help Sligh get them "off my back." The letter was, obviously, respondent's contribution to a scheme to conceal his neglect from his clients, the members of the club.

In my opinion this charge was sustained.

CHARGE IV: The petition alleges:

> In seven specified cases, respondent (1) made either no, or an inadequate, response to letters from the Grievance Committee's counsel requesting information in regard to complaints against respondent therein described, or to respondent's failure to respond to previous letters or invitations in reference thereto, and (2) failed to appear in connection therewith when requested, except at hearings before the Committee after charges had been preferred, or at the specific direction of the Committee during the course of said hearings.

THE ANSWER

Respondent's original answer denied all the allegations of the petition in reference to this charge.

At the hearing on September 14, 1966, respondent asked that these allegations be left "open", to permit him to examine the letters.

In respondent's amended answer, he

> "admits that in some instances (a through g) letters were not answered but an explanation of respondent's position was given or the reason no explanation could be given at that time was tendered, but in no event was he guilty of neglect."

During the October 18, 1966 hearing, petitioner gave respondent notice that it would apply to the referee for leave to amend this charge by adding additional cases, in which the communications to which respondent had failed to re-

[38]

spond had been sent too late to be referred to in the petition, and that if leave to amend were denied, petitioner

would offer the letters as evidence of a common plan or usage of respondent to ignore petitioner's request for information. The motion was subsequently made, and respondent having failed to show that adding these communications by amendment of the petition would affect him any differently from what they would if they had been originally included therein, the motion was granted. (See In re Rosenberg, 276 App. Div. 268, 271, 1st Dept. 1950; Matter of Horovitz, 228 App. Div. 484, 485, 1st Dept. 1980), and the letters were received in evidence.

The exhibits introduced under this charge and the amendment thereof were given numbers 17 to 38, inclusive, though in some cases the exhibit includes more than one letter.

THE EVIDENCE

It would be unnecessarily repetitious to refer to the contents of each of these letters referred to in this charge: reference to a few typical ones will give the general tenor of all of them.

The opening letter in the series here involved, dated August 17, 1962, requests respondent to appear at the Committee's office in connection with a complaint which had been made against him, and continues:

"Heretofore it has been generally our experience, when seeking to secure information from you regarding complaints concerning your professional conduct, that several such requests were necessary before you saw fit

[39]

to respond to them. You are reminded that failure to cooperate with this Committee also constitutes professional misconduct and it is urged that there be no repetition of that experience in this matter."

APPENDIX A

Letter after letter was sent to respondent requesting him to call at the Committee's office in reference to other complaints which had been made against him. One such letter, dated November 28, 1962, reads, in part:

> "You are advised that you have heretofore failed to keep some half dozen appointments to call at this office to discuss certain matters pending before us."

Another letter, this one dated June 24, 1964, refers to respondent's failure to respond to two earlier letters and contains the following:

> "It should be unnecessary to remind you that it is precisely this pattern of continued non-cooperation which, in great measure, has led to prior charges against you and hearings thereon by the Committee on Grievances. If you persist in ignoring our inquiries concerning the asserted misapplication of moneys delivered to you by Milton E. Turner, it can only result in additional charges."

The refrain throughout is the same: the failure to answer letters advising respondent of the receipt of complaints against him by his clients, and requesting a statement from him of his position in regard thereto; the continued failure to pay attention to successive requests for replies to letters sent him; letters calling attention to the inadequacy of an-

[40]

swers which respondent had made to earlier inquiries; the failure to respond to requests to call at the Committee's office in reference to complaints against him; the failure, sometimes persistent and continuous, to keep appointments previously made, etc., etc.

Respondent's answer to all this is that he had been engaged in the trial of the Pugash case for four months, and that immediately following that engagement he was prevented from consulting some of his files because Mr. Baker had denied him access to them for respondent's failure to pay his office rent.

These excuses are sham. Respondent relation to the Pugash case ended in late fall or early winter of 1961: the Underdown letters referred to in the petition run from August 17 to November 28, 1962, those in *Houghton* were dated October 10, 1962 and June 17, 1963; in *Kent,* they were in late 1962, and May 1963; in *Nelson* they did not begin until May 1963; in *Smith* the letter was dated October 2, 1963, and in *Obledo* and *Anglin,* it was dated December 17, 1963.

Obviously, respondent's preoccupation with the Pugash case, and his alleged difficulty with Mr. Baker immediately thereafter, furnish no excuse for respondent's contemptuous attitude toward the Committee's aforesaid letters—in many case a failure even to acknowledge them—or his unexplained failure to keep appointments which he had made.

When he was before the Grievance Committee, respondent said:

> "99% of these complaints got here because of a failure to communicate between myself and the clients, the inability to communicate at the time. I find myself in better circumstances now, and I can assure this Com-
>
> [41]
>
> mittee that from hence forward I will not be derelict and not fail in any matter so far as the practice of law is concerned."

Despite respondent's aforesaid assurances to the Committee, we find the same pattern of disregard of its communications thereafter, as witness the letters introduced under the amendment of the petition, which run during a period commencing February 1964 and ending September 1966.

With respect to these communications, respondent stated that he had not had time to consult his records in reference to the matters therein referred to, and when the hearings were about to close he requested, and was granted, permission to submit a written answer to the charge based on them, which answer, it was agreed, would be accepted with the same effect as if he had so testified at the hearing. Respondent has not submitted any such writing, nor has he offered any excuse for not doing so. The charge, to the extent it is based on these letters, is, therefore, admitted.

The failure of an attorney to cooperate with the Grievance Committee is unprofessional conduct. "Such conduct", this Court recently said,

> "Cannot be overlooked or condoned • • • Full and forthright cooperation with the committee is essential to the proper performance of its function, and the withholding of such cooperation without cause must be judged a grave disservice to the public interest." [Matter of Hubscher, 25 AD 2d, 113, 114 (1 D. 1966)].

See also, to the same effect:

Matter of Pines, 26 A. D. 2d, 424 (1 D. 1966);

[42]

Matter of Sultan, 26 A. D. 2d, 210 (1 D. 1966);
Matter of Somers, 22 A. D. 2d, 325 (1 D. 1965);
Matter of Thomson, 23 A. D. 2d, 441.

Respondent's lack of respect for his professional obligations is reflected not only in the way he ignored communications from his clients and from the Committee, but by his conduct in these proceedings. As examples: his long continued failure, before finally doing so, to carry out his promise to send the Underdowns the money to cover their expenses in attending the hearing herein, despite the fact that his promise to do so was the consideration of the granting to him of an adjournment he requested; his disregard of the referee's direction to notify the referee whether or not he had performed that promise; his failure to sign the stipulation pursuant to the arrangement made in the conference with Mr. Justice Breitel for the hearing on June 9, 1966, and his failure to proceed in accordance with the promise he made at that conference; his failure to serve his amended answer within the time he promised he would; his failure to serve a revised amended answer, for which permission was granted in response to his request, and in the absence of which all allegations of charges I, II and III stand undenied; his failure to submit his explanation with respect to the letters added by amendment to Charge IV, after being granted permission, at his request, to do so in lieu of oral testimony; his failure to acknowledge receipt of documents sent to him at his request by the referee, despite the referee's request, in the letter of transmittal, that

[43]

he acknowledge receipt thereof.

In my opinion this charge was sustained.

New York, March 10th 1967

Respectfully submitted,

GEORGE TROSK
Referee

APPENDIX B

OPINION OF THE APPELLATE DIVISION

NEW YORK SUPREME COURT
APPELLATE DIVISION : FIRST DEPARTMENT

IN THE MATTER OF JOHN R. SANDERS, ATTORNEY

Respondent disbarred effective July 28, 1967. Justices Stevens, Eager, Capozzoli, Tilzer and McGivern concur.

Disciplinary proceedings instituted by the Association of the Bar of the City of New York. Respondent was admitted to the Bar on April 2, 1951, at a term of the Appellate Division of the Supreme Court in the First Judicial Department. By order entered March 18, 1965, George Trosk, Esq., was appointed referee to take testimony and report to this court.

John G. Bonomi of counsel (Michael Franck with him on the brief) for petitioner Association of the Bar of the City of New York.

Respondent pro se.

Per Curiam-

The respondent, an attorney admitted to practice in the First Judicial Department on April 2, 1951, is charged with serious professional misconduct, including the withdrawal without authority of funds from an estate account.

APPENDIX B

The charges, which were alleged, sustained by the referee and established by the record, include the following: (Charge 1) Respondent grossly neglected an estate proceeding for which he had been retained; he failed to advise his client, the administratrix, of his use of estate checks signed in blank by her, at his request, and he failed to forward the estate account passbook, cancelled checks and bank statements to his client when requested by her to do so. (Charge 2) Respondent withdrew $800 of the estate funds for personal use without authority by completing one of the signed blank estate checks delivered to him by the administratrix for the purpose of paying estate or realty taxes. (Charge 3) He misrepresented and concealed from a client his non-performance of services and the status of an application for incorporation which he had been retained to secure.

The referee's report is in all respects confirmed.

Respondent was suspended by this court for three months on June 19, 1958, because "in disregard and disrespect for the law * * * he ignored 54 traffic tickets * * * he failed to supply his client, upon demand, with a written accounting of the disposition of moneys the respondent held in escrow * * * and failed to remit the balance to his client * * * (Matter of Sanders, 6 A.D. 2d 87: reinstated 6 A.D. 2d 1034).

APPENDIX B

Such behavior on respondent's part, as is evidenced by this and the prior proceeding, demonstrates a pattern of consistent misconduct and a complete disinterest by respondent in his professional obligations. Respondent clearly lacks the character and fitness required of an attorney at law (Matter of Turk, 25 A.D. 2d 255). In view of the gravity of his misconduct, as evidenced by the charges referred to, he should be disbarred.

APPENDIX C

ORDER

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 29th day of June, 1967.

Present - Hon. HAROLD A. STEVENS,
Justice Presiding
SAMUEL W. EAGER,)
LOUIS J. CAPOZZOLI,)
GEORGE TILZER,) Justices
OWEN McGIVERN,)

In the Matter of John R. Sanders, An Attorney.	M 1787

The Association of the Bar of the City of New York, by John G. Bonomi, Esq., its attorney, having presented to this Court on the 16th day of February, 1965, a petition containing charges of professional misconduct against the above-named respondent, John R. Sanders, who was admitted to practice as an attorney and counselor-at-law in the State of New York, on the 2nd day of April, 1951, at a term of the Appellate Division of the Supreme Court, First Judicial Department, and

having petitioned the Court to take such action upon such charges as in the judgment of said Court justice may require; and the respondent having appeared herein in person and having interposed an answer to said petition, duly verified the 2nd day of March, 1965, and the Court having duly made and entered an order on the 18th day of March, 1965, appointing George Trosk, Esq., as Referee herein to take testimony in regard to said charges and to report to this Court his opinion thereon; and a hearing, pursuant to said order of reference having been duly held before the said Referee and the said Referee having duly heard the testimony and proofs tendered by the parties hereto, and havi ng thereafter rendered his report thereon to this Court, which report was dated the 10th day of March, 1967, and was filed in the office of the Clerk of this court on the 23rd day of March, 1967;

And the petitioner thereafter and on the 22nd day of May, 1967, having moved for an order confirming the Referee's report and adjuding the respondent guilty of professional misconduct and that the Court take such action herein as it might deem just and proper;

Now, upon reading the petition of The Association of the Bar of the City of New York, verified the 8th day of January, 1965, the affidavit of John G. Bonomi, Esq. annexed thereto, sworn to the 8th day of January, 1965, the notice

of presentation of said petition, dated the 8th day of January, 1965, with proof of due service thereof upon the respondent, the answer of the respondent to said petition, verified the 2nd day of March, 1965, the order of this Court, dated the 18th day of March, 1965, appointing George Trosk, Esq., as Referee herein, all of which papers were duly filed in the office of the Clerk of this Court on the 18th day of March, 1965, the amended answer of respondent to said petition, dated the 28th day of October, 1966, and the report of George Trosk, Esq., the Referee herein, dated the 10th day of March, 1967, together with the testimony taken by him and the exhibits offered in evidence, which were filed in the office of the Clerk of this Court on the 23rd day of March, 1967; and upon reading and filing the notice of motion for an order confirming the report of the Referee and adjudging the respondent guilty of professional misconduct, dated the 17th day of April, 1967, with proof of due service thereof, the statement of respondent, dated the 23rd day of May, 1967, and after hearing Mr. John G. Bonomi for the motion, and Mr. John R. Sanders, respondent pro se, opposed, and due deliberation having been had thereon; and the Court having unanimously found and decided that the respondent has been guilty of professional misconduct in his office of attorney and counselor-at-law, it is hereby unanimously

APPENDIX C

Ordered that the report of George Trosk, Esq., the Referee herein, filed in the office of the Clerk of this Court on the 23rd day of March 1967 be, and the same hereby is, confirmed; and it is further unanimously

Ordered that the said John R. Sanders be and he hereby is disbarred from practice as an attorney and counselor-at-law in the State of New York effective July 28, 1967; and it is further unanimously

Ordered that the name of the said John R. Sanders be struck from the roll of attorneys and counselors-at-law in the State of New York effective July 28, 1967; and it is further unanimously

Ordered that the said John R. Sanders be and he hereby is forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, effective July 28, 1967; and it is further unanimously

Ordered that the said John R. Sanders be and he hereby is forbidden to give another an opinion as to the law or its application or any advice in relation thereto effective July 28, 1967.

ENTER:

HYMAN W. GAMSO
Clerk

APPENDIX C

APPELLATE DIVISION-SUPREME COURT-FIRST DEPARTMENT STATE OF NEW YORK

I, HYMAN W. GAMSO, Clerk of the Appellate Division of the Supreme Court, First Judicial Department, do hereby certify that I have compared this copy with the original thereof filed in said office on June 29, 1967 and that the same is a correct transcript thereof, and of the whole of said original.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court on June 29, 1967.

Hyman W. Gamso,
Clerk

A P P E N D I X D

ORDER

COURT OF APPEALS
STATE OF NEW YORK
- - - - - - - - - - - - - - -X

(SAME TITLE)

ORDER

- - - - - - - - - - - - - - -X

The above named attorney-respondent having moved for a stay of the operation of the order of the Appellate Division, First Department, dated June 29, 1967 (which order disbarred the respondent as an attorney, effective July 28, 1967) pending the hearing and determination of an application to this Court for leave to appeal from the said order of disbarment; and Theodore Krieger, Esq., attorney for the attorney respondent, having appeared before the undersigned and argued in support of the said application; and John G. Bonomi, Esq. (Ronald Eisenman, Esq., of counsel), having appeared and argued in opposition thereto; now, therefore,

On motion of Theodore Krieger, Esq., attorney for the respondent, it is

ORDERED, that the said application be, and the same hereby is granted; and it is further

APPENDIX D

ORDERED, that pending the hearing and determination of an application by the respondent for leave to appeal to the Court of Appeals from the said order of the Appellate Division, First Department, dated June 29, 1967 disbarring the respondent as an attorney and counsellor-at-law, the aforesaid order be, and the same hereby is, stayed; and it is further

ORDERED, that a motion for leave to appeal to the Court of Appeals from the said order of the Appellate Division, First Department, dated June 29, 1967, be brought on to be heard September 18, 1967, and that all papers and memorandum in support of said application be served on the attorney for the Petitioner, on or before August 22, 1967.

Dated: July 12, 1967

/s/ Kenneth B. Keating
KENNETH B. KEATING
Judge of the Court of Appeals
of the State of New York

A P P E N D I X E

STATE OF NEW YORK,
IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-fourth day of October, A.D., 1967.

PRESENT, HON. STANLEY H. FULD,
Chief Judge, presiding.

---

1 Mo. No. 837
In the Matter of
John R. Sanders, an Attorney,
Appellant,

John G. Bonomi,
Respondent.

Motions for leave to appeal and for a stay in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motions be and the same hereby are denied.

(SEAL) A copy

/s/ G. Kimball
Deputy Clerk

A P P E N D I X F

October Term, 1967

SUPREME COURT OF THE UNITED STATES

- -X

JOHN R. SANDERS,

Petitioner,

vs.

JOHN G. BONOMI (THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK)

- -X

S I R:

PLEASE TAKE NOTICE that the within is a copy of an order duly made in this proceeding and duly filed in the office of the Clerk of the United States Supreme Court, on January 17, 1968.

Dated: February 28, 1968

Yours etc.,

JOHN R. SANDERS
Pro Se
Office and P.O.Address
61 Hamilton Place
New York 10031, N.Y.
(212) SW 4-9192

TO:

JOHN G. BONOMI, Esq.
36 West 44th Street
New York 10036, New York
(212) MU 2-0606

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No.----------,October Term, 1967

JOHN R. SANDERS,

Petitioner

vs.

JOHN G. BONOMI (THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK)

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 7th, 1968.

/s/ John M. Harlan
Associate Justice of the Supreme Court of the United States

Dated this 17th
day of January, 1968.

APPENDIX G

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION - FIRST DEPARTMENT
- X

In the Matter of

JOHN R. SANDERS,

An Attorney.
- X

On reading the affidavit of John R. Sanders, duly affirmed on the day of May, 1966, and on motion of John R. Sanders, appearing in person and specially for the purpose of this motion, it is

ORDERED, That the petitioner, The Association of the Bar of the City of New York, show cause at the Motion Term of Court to be held at the Court House, Madison Avenue and 25th Street in the City of New York on the day of May, 1966 at o'clock in the noon, or as soon thereafter as counsel can be heard why an order should not be made staying the hearing of the within proceedings before the Hon. Referee, the same to take place on the 4th day of May, 1966, on the ground that respondent will be unable to appear in that he is prohibited from doing so because of an order of the United States District Court, Southern District of New York and thereby will be prejudiced for the reason that he will be denied the right to confront witnesses who may appear against him and to cross examine same, and why respondent should not have such other and further relief as may be just and

APPENDIX G

ORDERED FURTHER, That petitioner herein and its attorney be, and they hereby are, stayed from taking any other further steps in this action until after the hearing and determination of the motion brought on by this order to show cause, and

ORDERED FURTHER, That service of a copy of this order and of the papers upon which it is granted, made on petitioner or its attorney on or before the day of May, 1966, shall be sufficient.

Dated, New York City, May 3, 1966.

_____

J.S.C.S.N.Y.

APPENDIX G

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION - FIRST DEPARTMENT
- X

In The Matter of

JOHN R. SANDERS,

An Attorney.

- X

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss-

JOHN R. SANDERS, an attorney at law duly licensed to practice law in the State of New York affirmeth,

That he is the Respondent in the above captioned proceedings.

That this affidavit is made in furtherance of a request for an adjournment and to further detail the surrounding circumstances not heretofore set forth in the telegram of April 29, instant, received by the Honorable Referee and known to Petitioner.

That Respondent has requested but one adjournment in this proceedings and that out of dire necessity in that Respondent was actually engaged on trial and was powerless to do otherwise.

That Petitioner has requested and received three adjournments.

APPENDIX G

That the Honorable Referee indicated on the first occasion that this proceedings was on for a hearing, at which time Respondent made his one and only application for an adjournment, that despite any engagements this matter would proceed whether or not Respondent was able to attend or be represented by counsel.

That at that time and at all times thereafter Respondent unequivocally indicated his desire to be present at the hearing and have the right to cross examine.

That Petitioner's three requests for an adjournment followed.

That since, Respondent has been informed that the instant proceeding is an Appellate Division matter and takes precedence over all other engagements in State and Federal Courts.

That none of the foregoing has, in any manner been violated by Respondent, whether precedent exists or does not exist and Respondent has not accepted an engagement, including the present case in the District Court, as will be shown.

That in the first instance, Petitioner and, it is believed, the Honorable Referee, were informed many weeks prior to this time of Respondent's engagement in the United States District Court of the trial of United Case against JOHN L.

LACEY, which trial lasted for a period of nine weeks, not including pre-trial matters.

That at that time all of the facts concerning Respondent's present engagement (United States against LEROY DAVIS) were made crystal clear and they are as follows-

(1) United States against LEROY DAVIS is an old and serious case involving many defendants and their attorneys making it difficult to have all attorneys present at one time.

(2) That for a long time since, deponent has received a substantial fee.

(3) The case was being adjourned from week to week, even prior to the LACEY case, in an attempt to follow the MALCOLM X case because one of the attorneys in the instant case was there engaged.

(4) That as a matter of fact, if deponent's recollection serves him correctly the instance case was marked ready for trial and sent out for trial to Honorable Canelle, District Judge, during, but near the predictable end of the MALCOLM X trial but returned to the presiding Judge in Court room 318 because it could not, at that time, be reached.

(5) At all times Respondent stated that he could not be available until after the present engagement (Davis case) because, as was said then and is herewith stated, the instant case was to follow on the heels of and directly behind the Lacey case.

That in view of the foregoing, Respondent was powerless to act otherwise during that time and at the completion of the Lacey case.

That the Davis case, as heretofore stated, was adjourned from time to time, in the absence of the defendants involved and their attorneys.

That based upon all of the foregoing facts, on Tuesday, April 26, the Davis case was marked ready for trial and assigned to Honorable Croake, District Judge which deponent was powerless to stop.

That in addition, it is clear that deponent in no way, engaged himself in the Davis case.

That your deponent is presently under the direct order of the United States District Court which order states-

(1) That deponent is actually engaged on trial,

(2) That deponent is not to accept any other engagements,

(3) That this is a direct order,

(4) That affidavits of actually engagements are to be presented to other courts,

(5) That deponent is on call.

That should deponent act otherwise he would be in contempt and subject to punishment, not only by the United States District Court but by Petitioner as well.

That once again it is repeated that deponent has not wilfully impeded this proceeding, that he has indicated his desire to expedite same, that the present plight is not his doing, that he only asks for simple justice in that he be permitted to be present at this proceeding together with the right of confrontation and the right to cross examine, that he be lifted from the horns of this dilemna and not be made subject to contempt and punished for the same.

That this application is made pursuant to the direct order of the United States District Court, as well as the other reasons set forth.

APPENDIX G

WHEREFORE, it is respectfully requested that the within proceeding be adjourned until after the completion of the case of United States against LeRoy Davis.

Affirmed under The Penalty of Perjury this day of May, 1966.

JOHN R. SANDERS

A P P E N D I X H

COMMITTEE ON GRIEVANCES
of
THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
36 West 44th Street
New York, N.Y. 10036

JOHN G. BONOMI
Chief Counsel

Room 914
Area Code 212
MUrray Hill 2-0606

PETER J. O'CONNOR
RAYMOND P. WHEARTY
ROBERT F. CONDON
RONALD EISENMAN
Assistant Counsel
MICHAEL FRANCK
Administrative Counsel

May 4, 1966

PERSONAL

John R. Sanders, Esq.
61 Hamilton Place
New York, N.Y.

Dear Sir:

This will confirm the result of the conference with Judge Breitel on May 3, 1966, when you presented your proposed order to show cause for a stay of the disciplinary hearing in your matter, scheduled for the following day. The order to show cause, of course, was not

signed in view of Judge Breitel's recommendation. The Referee subsequently accepted the recommendation.

It is the understanding that (1) the hearing scheduled for May 4, 1966, is cancelled, (2) immediately upon the conclusion of the trial or other disposition of the case entitled United States v. Aiken et al, in which you represent the defendant Leroy Davis, you are to notify counsel for the petitioner, The Association of the Bar of the City of New York, (3) counsel for the petitioner will independently keep currently advised as to the status of the Aiken or Davis case, (4) a hearing in your matter is to be scheduled for one week from the date of termination of the Aiken case but in no event later than June 9, 1966, except that no hearing is to be scheduled for or held on June 6, 1966, (5) in the event a hearing is scheduled for June 9, 1966, and on any continued date or dates, you are to attend, notwithstanding the Aiken case may be then still in progress and (6) no further adjournments will be granted, unless, of course, application therefor is addressed to the Referee and granted by him. You will recall that Judge Breitel referred to the date June 9th, which you selected, as a "copper clad" date for hearing.

APPENDIX H

Enclosed in triplicate for your signature is a proposed formal stipulation, as suggested by Judge Breitel, embodying the above understanding. It will be appreciated if you will return the original to us for filing and one copy for our file, retaining the remaining copy for your record.

Very truly yours,

RPW jb
encs

Raymond P. Whearty

cc: Hon. Charles D. Breitel
George Trosk, Esq.

A P P E N D I X I.

RLK:ak
38336
32226

January 25, 1966

The following teletype sent this day via GSA (Op. JBL):

John R. Sanders
61 Hamilton Place
New York, N.Y.

United States v. Bayley, et al, including John Lacey and Catherine Wood, assigned to trial before Judge Inzer B. Wyatt to commence about February 7. Judge Wyatt requests you appear at conference of attorneys, Thursday, January 27, 3 P.M. Room 705, U.S. Courthouse, Foley Square.

ROBERT M. MORGENTHAU
U. S. ATTORNEY

cc:

Mr. King
Adm. Off.
File Room
AK

APPENDIX J

UNITED STATES DISTRICT COURT
Southern District of New York

Chambers of
INZER B. WYATT
Judge
U. S. Courthouse
New York, N.Y. 10007

April 22, 1966

TO WHOM IT MAY CONCERN:

This is to certify that since February 21, 1966 John R. Sanders, Esq., has been actively engaged in the trial before me and a jury of United States v. Bayley, et al., and is today required to be at all times in or near the courtroom because the jury is deliberating and sending numerous notes, asking for exhibits, reading of testimony, and reading of parts of the charge. Defendants and their counsel must be present for such matters.

/s/
INZER B. WYATT,
United States District
Judge

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1213

JOHN R. SANDERS,

Petitioner,

—v.—

JOHN G. BONOMI

(The Association of the Bar of the City of New York),

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

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March 22, 1968

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Preliminary Statement

This is a petition for a writ of certiorari to review an order of the Court of Appeals of the State of New York, entered on October 24, 1967, denying petitioner's motion for leave to appeal an order of the Appellate Division, First Judicial Department, entered June 29, 1967, disbarring him as an attorney and counselor-at-law admitted to practice in the State of New York, effective July 28, 1967.

Statement of the Case

Following the submission of a petition instituting charges of misconduct, and the filing of an answer thereto by petitioner, George Trosk, Esq., was appointed referee by order of the Appellate Division, First Department, entered March 18, 1965. A copy of that order with notice of entry was served upon petitioner on March 23, 1965 (Pet. Ex. 1; Min.* pp. 10-11). The referee thereafter communicated with counsel for respondent and suggested that hearings commence in June 1965, but was advised that this was not possible because one of respondent's witnesses, who resided in Washington, D. C., was then in the process of retiring from government service and could not obtain a leave of absence for the purpose of coming to New York to testify (Min. pp. 10-11). Although petitioner did contend the following September, while seeking an adjournment of the hearing then scheduled, that June hearings "would have been perfect for him" (Min. p. 11), he never communicated with either the referee or counsel for respondent to request a hearing at that time, much less to arrange for a specific date.

The petition for certiorari filed herein states (p. 8) that prior to June 1965, the referee granted respondent two adjournments because witnesses were ill. This is untrue and the page citation which petitioner cites in support thereof (Min. p. 59) clearly demonstrates that he is referring to events, later discussed herein, which actually took place after he obtained an adjournment of the hearing scheduled for September 15, 1965.

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* Min. references are to the transcript of the hearings before the referee.

On August 20, 1965, petitioner was served with a notice advising him that the hearing would be held on September 15, 1965, at 10 A.M. (Pet. Ex. 2; Min. pp. 2-3). On September 9, 1965, counsel for respondent wrote petitioner that witnesses coming from Washington, D. C., would be called to testify at the hearing scheduled for September 15, and that "In the circumstances, you will be expected to be ready to proceed" (Pet. Ex. 3; Min. pp. 4-5).

On September 13, 1965, petitioner telephoned counsel for respondent and requested an adjournment of the hearing scheduled for September 15, upon the ground that he was engaged on trial in a criminal case in the Supreme Court, New York County, and at the conclusion of that case he was committed to proceed to trial in another case pending in the same Court (Min. p. 5). Counsel for respondent advised petitioner that he had received more than one month's notice of the scheduled hearing; that witnesses were coming from Washington to testify; and that the hearings before the referee, in a matter pending in the Appellate Division, had precedence over cases pending in the Supreme Court (Min. pp. 6-7). Petitioner advised that he would submit an affidavit of actual engagement to the referee (Min. pp. 7-8). He did not do so (Report,* p. 4).

Although the hearing on September 15, 1965, was scheduled for 10 A.M., and petitioner had been so notified, he did not appear until 10:35 A.M. (Min. p. 11). He advised the referee that he had been delayed at a calendar call in the Civil Court, a court not only inferior to the Appellate Division, but to the Supreme Court as well (Min. p. 11).

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* The Referee's report is printed as an appendix to the petition. Somehow, many of its pages became reversed. Consequently, respondent is reprinting the report as an appendix hereto.

Petitioner thereupon requested the referee to adjourn the hearing upon the ground that he was actually on trial in the Supreme Court, New York County. The referee repeatedly advised petitioner (Min. pp. 16, 19, 24) that what he should have done was to adjourn his case in the Supreme Court on the ground that the Appellate Division proceeding was pending and took precedence. Petitioner having failed to even attempt to do so, the referee advised him that he would proceed to hear the witnesses who had come from Washington, D. C., and were then waiting outside the courtroom.

Petitioner then offered to bring these witnesses back at an adjourned date at his own expense (Min. p. 25) and, with the consent of the witnesses, the referee thereupon granted the adjournment (Min. pp. 35-41) to a date selected by petitioner, October 14, 1965 (Min. p. 38).

Subsequently, three scheduled hearings, including the one on October 14, 1965, were adjourned pending the recovery of one of the witnesses for respondent from injuries sustained in an accident. During this period, petitioner was given written notice of each scheduled date for a hearing and was, on each occasion, reminded of his undertaking to forward funds to the witnesses in Washington, D. C., to enable them to return to New York, on the basis of which he had obtained the adjournment of the September 15, 1965, hearing (Pet. Ex. 42; Min. pp. 147-50). Petitioner did not forward the funds. On February 23, 1966, counsel for respondent sent petitioner such a notice advising him that a hearing was scheduled to be held on March 3, 1966, and including, pursuant to the request of the referee, a direction that petitioner telephone the referee promptly upon receipt to confirm whether he had, in fact, forwarded

to the witnesses in Washington, D. C., the necessary monies for their expenses (Pet. Ex. 39; Min. pp. 144-5). Despite that direction, petitioner never communicated with the referee (Min. p. 154; Report, p. 5).

The witness having finally recovered, a hearing was scheduled to be held on May 4, 1966, at which respondent was prepared to proceed. On the day before, May 3, 1966, petitioner appeared before Judge Breitel (then a Justice of the Appellate Division, First Department) to present an order to show cause seeking an adjournment of the hearing scheduled for May 4, upon the ground that he was then actually engaged in a trial in the Federal District Court for the Southern District of New York (Min. p. 50). A conference was thereupon held between Judge Breitel, counsel for respondent and petitioner, at which it was agreed that the hearing would be adjourned to June 9, 1967, a date selected by petitioner (Min. p. 50), when it would go on without fail. Petitioner himself described the adjourned date as "ironclad" (Min. p. 50) and later conceded that it was clearly understood and agreed that the hearing before the referee would go on whether or not the case in the Federal Court had been included (Min. p. 53).

Stipulations confirming the arrangement made at the conference with Judge Breitel were mailed to petitioner on May 5, 1966, by certified mail. Although counsel for respondent advised petitioner on the following day that the certified letter contained the said stipulations, petitioner did not pick them up at the Post Office until May 24, 1966. He, thereafter, failed to sign the stipulation (Min. pp. 51-2; Report, p. 9).

On June 1, 1966, counsel for respondent forwarded a notice to petitioner reminding him that the hearing would

be held on June 9, 1966, whether or not the Federal Court case was still on trial in accordance with the agreement reached at the conference with Judge Breitel (Pet. Ex. 41; Min. pp. 146-7). Not having heard from petitioner, counsel for respondent contacted the witnesses in Washington, D. C., and arranged for them to come to New York for the hearing scheduled for June 9, 1966, forwarding the necessary funds inasmuch as petitioner had himself not done so as he had agreed to do on September 15, 1965, as a condition of the adjournment received on that date, and having failed to respond to communications with respect thereto.

On June 8, 1966, one day before the scheduled hearing, petitioner advised counsel for respondent that the Federal Court case was still continuing and that he, consequently, would have to ask to adjourn the scheduled hearing (Min. pp. 157-8). On June 9, 1966, the witnesses having once more arrived from Washington, D. C., petitioner appeared before the referee and personally requested that the hearing be adjourned.

In response to questions by the referee, petitioner conceded that he had made no request of the trial judge for permission to attend the disciplinary proceeding (Min. p. 53). He also disclosed that the trial judge had demonstrated, during the course of the trial, that he was prepared to recess for good cause, the trial having been delayed for a week to ten days due to deaths in the family of one of the jurors, illness of one of the defendants, illness of one of the jurors, and the death of the wife of one of the defense counsel (Min. pp. 48-9).

In these circumstances, the referee denied petitioner's request for an adjournment. Petitioner was advised that, if he did not remain during the taking of testimony, he

would be given the right to read the minutes when they were transcribed and have the witnesses recalled if he decided that he wished to cross-examine them (Min. p. 61). Petitioner thereupon left the hearing, stating that he was going to attend the Federal Court trial, and the testimony of the witnesses was taken. At the conclusion of the direct testimony, the referee instructed counsel for respondent to send petitioner a written notice as soon as the minutes had been transcribed and were available for his inspection (Min. p. 154).

By letter dated August 2, 1966, petitioner was advised that the minutes were available (Pet. Ex. 44; Min. pp. 161-2). Petitioner did not acknowledge the letter, or make any effort to inspect the minutes (Min. p. 163), later explaining that "I prepared myself otherwise" (Min. p. 215) and that he was familiar with the substance of the witnesses' testimony since they had testified at a preliminary hearing before the Committee on Grievances (Min. p. 161).

He subsequently decided to avail himself of the referee's offer to permit him to recall the witnesses in order to cross-examine them (Min. p. 235). Before proceeding to do so, petitioner stated for the record that by cross-examining the witnesses he was not waiving his objection to their direct testimony having been taken outside of his presence. When asked how he claimed he was prejudiced by not having been present during the direct testimony, petitioner replied that, due to his absence, he had been unable to object to any improper questions or to move to strike testimony, etc. The referee thereupon reminded petitioner that he had been repeatedly advised that he would be free to examine the transcript of the witnesses' testimony and to make any objections which he felt he might have made at

the time the testimony was taken. The referee thereupon inquired whether petitioner had availed himself of the opportunity to inspect the transcript and he replied that he had not (Min. pp. 263-4).

Petitioner then proceeded to cross-examine the witnesses. Cross-examination of respondent's principal witness, whose direct testimony took 51 pages of the transcript (Min. pp. 62-112), takes up 109 pages of the transcript (Min. pp. 266-374).

On March 23, 1967, the referee filed his report finding each of the four charges contained in the petition sustained. By order entered June 29, 1967, the Appellate Division, First Department, confirmed the report of the referee and disbarred petitioner, effective July 28, 1967.

ARGUMENT

I.

The referee's conduct of the hearings in the circumstances presented was a reasonable exercise of his discretion.

Although petitioner now contends, in an apparent effort to bring himself within the constitutional, statutory and case law citations contained in the petition for certiorari, that a disciplinary proceeding is a criminal case, he conceded that it was not in seeking leave to appeal to the Court of Appeals of the State of New York (App. Br. p. 15). This Court has, of course, held that disciplinary

proceedings are civil rather than criminal in nature, *Ex Parte Wall,* 108 U. S. 265, 288. Thus, an attorney against whom charges of misconduct have been made is not subject to arrest, or incarceration, or the fixing of bail or any other method of guaranteeing his appearance at time of trial. It must follow, therefore, that the requirements of due process in a disciplinary (or other license revocation) proceeding is satisfied if an attorney has been given a reasonable opportunity to be present at the hearings held with respect to the charges. Absent any means to compel the attorney's presence, to hold otherwise would mean that the charges against him could only be determined if he voluntarily appeared. A mere statement of that proposition demonstrates its irrationality.

The cases cited by petitioner are not relevant to the issue presented here.

In *Snyder* v. *Massachusetts,* 291 U. S. 97, this Court recognized that even in a criminal case, the right of the accused to be present may be lost by consent "or at times even by misconduct" (at 106). In the same opinion, the Court stated that the privilege of confrontation was particularly intended to preserve the right of the accused to cross-examine witnesses (at 107). Petitioner's right to cross-examination here was carefully preserved.

In *Willer* v. *Committee on Character and Fitness,* 373 U. S. 96, this Court reversed the denial of admission to the Bar of the State of New York where the applicant, unlike petitioner here, was not specifically informed of the "charges" upon which the refusal to admit him was predicated; was not given a hearing; and was not permitted to cross-examine his "accusers".

In *Pointer* v. *Texas*, 380 U. S. 400, this Court reversed a criminal conviction upon the ground that the introduction of a transcript of a witness' testimony taken at a preliminary hearing deprived the accused of his constitutional right to cross-examine the witness, a right afforded to, and exercised by, petitioner here.

In determining whether petitioner here was afforded a reasonable opportunity to be present at the hearing in question, one must consider the events which transpired up to that point.

Petitioner had had approximately four weeks notice that the first hearing was scheduled to be held on September 15, 1965 (Pet. Ex. 2; Min. pp. 2-4). On September 9, 1965, six days before the scheduled hearing, petitioner was advised by letter that witnesses were coming from Washington, D. C., and that "In the circumstances, you will be expected to be ready to proceed" (Pet. Ex. 3; Min. pp. 4-5). On the same day, September 9, 1965, petitioner went to trial (in the sense that one juror was sworn) in a criminal case pending in the Supreme Court of the State of New York but the commencement of the trial was itself deferred for several days (Min. pp. 12-13). Petitioner made no effort to seek an adjournment of that trial upon the ground that he was committed at the Appellate Division hearing (a court of superior jurisdiction) the following week, and, in fact, in no way advised the Trial Judge thereof. Moreover, although petitioner knew when he received the letter from counsel for respondent written on September 9, 1965, advising that witnesses were coming from Washington, D. C., that he would be unable to attend the hearing scheduled for September 15, 1965, as a result of his trial commitment, petitioner did not advise the attorney for respondent

of his intention to seek an adjournment until sometime on September 13, 1965, and subsequently failed to make a written request for an adjournment as he had represented he would. The out-of-state witnesses consequently were present on the date the hearing was scheduled, September 15, 1965.

The referee nevertheless agreed to adjourn the hearing provided, as petitioner agreed, that he would bear the expenses of having the witnesses return for the adjourned date. Thereafter, several scheduled hearing dates were cancelled because of injuries sustained by one of the witnesses for respondent which incapacitated her and prevented her from coming to New York to testify. Petitioner was notified of the scheduling of each of these dates, the first of which he had himself requested when the September 15, 1965, hearing was adjourned (Min. p. 38), and with each such communication was reminded of his undertaking to furnish the witnesess with the necessary funds for them to return to New York to attend the adjourned hearing (Pet. Ex. 42; Min. pp. 147-50). He did not do so although the present petition implies he was prepared to proceed on each of these dates which subsequently were adjourned by respondent.

On February 23, 1966, petitioner was sent a notice of a hearing to be held on March 3, 1966, containing the referee's direction to petitioner that he promptly communicate with the referee to confirm whether he had forwarded the expense monies to the witnesses in accordance with his undertaking at the hearing on September 15, 1965 (Pet. Ex. 39; Min. pp. 144-5). Petitioner never communicated with the referee as requested (Min. p. 154).

In the present petition, petitioner seeks to excuse his failure to send the witnesses the necessary funds (while

ignoring the fact that he failed to comply with the referee's direction to advise whether or not he had forwarded the funds in question) upon the ground that to do so would have been a foolish act since petitioner was engaged in the Federal trial and, therefore, could not appear at any hearing at which the witnesses could testify (Pet., p. 15). That might be an arguable position with respect to the hearing later scheduled to be held on June 9, 1966, but it cannot excuse petitioner's failure to send the witnesses money for their expenses to attend the hearings scheduled to be held October 14, 1965, December 7, 1965 and March 3, 1966 (Pet. Ex. 39; Min. pp. 144-5; Pet. Ex. 42; Min. pp. 147-150), each of which was later cancelled by counsel for respondent due to the illness of his witness and none of which could have interfered with the Federal trial which, according to petitioner himself, was not marked ready until April 26, 1966 (Pet., pp. 12-13). There could, therefore, be no other conclusion drawn from petitioner's continued failure to send the witnesses money for their expenses as he had undertaken to do or to comply with the referee's direction that he indicate whether or not he had complied with that undertaking than that petitioner was deliberately seeking to delay the hearings.

On April 7, 1966, petitioner was advised that the hearing would be held on May 4, 1966 (Pet. Ex. 40; Min. pp. 145-6). One day before that scheduled hearing, on May 3, 1966, petitioner appeared before Judge Breitel to seek an adjournment on the ground that he was then engaged in a trial in the Federal Court. At the ensuing conference, it was mutually arranged to adjourn the hearing to June 9, 1966, a date selected by petitioner (Min. p. 50), when it would be held without fail. A stipulation confirming this

agreement was forwarded to petitioner on May 5, 1966, by the attorney for respondent but petitioner failed to sign the stipulation or to advise counsel for respondent that he would not do so, thereby clearly indicating that he never had any intention of complying with the arrangement to which he had agreed.

On June 1, 1966, petitioner was notified in writing that a hearing would be held on June 9, 1966, in conformity with the agreement reached in Judge Breitel's chambers (Pet. Ex. 41; Min. pp. 146-7). This notice further advised petitioner that if he failed to honor his commitment to provide the money for the expenses of the witnesses, respondent would move to amend the charges in that regard. Upon receipt of that notice, presumably on June 2, 1966, or certainly no later than June 3, 1966, petitioner either expected to be able to proceed on June 9, 1966, or knew that he would not be able to. If he expected to be able to proceed, and was desirous of doing so as he now professes, he would have forwarded the expense monies to the witnesses. He did not do so. If, on the other hand, petitioner knew upon receipt of the notice that he could not proceed on June 9, 1966, he would have immediately contacted counsel for respondent to so inform him. He did not do that.

Petitioner, in fact, did not communicate with counsel for respondent until June 8, 1966, one day before the scheduled hearing, when he advised that he would request an adjournment. By then, counsel for respondent, not having heard from petitioner, had again forwarded expense monies to the witnesses who were on their way to New York. On June 9, 1966, the day scheduled for the hearing pursuant to the arrangement agreed upon at the conference with

Judge Breitel, the witnesses arrived prepared to testify. Petitioner appeared before the referee and requested an adjournment upon the ground that he was still on trial in the Federal Court. As on the prior occasion when petitioner sought and obtained an adjournment on the ground that he was engaged elsewhere, petitioner made no effort whatever to request a recess of the trial in Federal Court to enable him to appear in the disciplinary proceeding pending against him (despite the referee's advice on the prior occasion when petitioner was engaged in a trial that this is what petitioner should have done), even though the judge presiding had demonstrated an understanding for the personal problems of the participants in the trial, having granted recesses totaling a week to ten days for such reasons.

In passing upon petitioner's application for a further adjournment, the referee was, therefore, faced with the following facts:

1) Petitioner, having had four weeks notice of the hearing scheduled for September 15, 1965, failed to advise counsel for respondent that he would request an adjournment until September 13, 1965, although the request was predicated upon petitioner's actual engagement in a trial which had commenced on September 9, 1965, in a court of inferior jurisdiction;

2) Although petitioner had obtained an adjournment of the September 15, 1965, hearing upon the specific representation that he would undertake to forward the necessary funds to the out-of-town witnesses to enable them to appear at an adjourned date, he failed to do so although notified of hearings to be held in October 1965, December 1965 and March 1966, which petitioner presumably was prepared to attend and which ultimately had to be ad-

journed by respondent due to the illness of one of the witnesses;

3) Petitioner ignored the referee's direction to communicate with him to advise whether or not he had complied with his undertaking to furnish expense monies to the witnesses;

4) Petitioner had obtained an adjournment of a hearing scheduled for May 4, 1966, upon the ground that he was engaged in a Federal trial at which time he agreed to proceed with the hearing on June 9, 1966, a date he selected, whether or not the Federal case was concluded;

5) Although petitioner had been reminded in writing on June 1, 1966, that the hearing would be held on June 9, 1966, and was again reminded of his undertaking to furnish expense monies to the witnesses, he neither sent the monies to the witnesses nor communicated with counsel for respondent until June 8, 1966, one day before the hearing, when he must have known that the witnesses were once again on their way to testify.

In these circumstances, the referee denied petitioner's request for an adjournment, refusing to once again send the witnesses back to Washington, but reserving to petitioner the right to examine the transcript of their direct testimony, the right to object and to move to strike any testimony which he claimed was improperly taken and the right to have the witnesses recalled for cross-examination. We respectfully submit that in the circumstances presented, the referee's determination in this regard was, to say the least, a reasonable exercise of his discretion as the officer presiding at the hearing.

Since the issues of fact were to be decided solely by the referee, no jury being involved, the proposed procedure of affording petitioner the right to inspect the transcript, to object and to move to strike any testimony improperly taken, afforded him an adequate opportunity to remove from the record any allegedly improper evidence received in his absence. Despite this opportunity, petitioner did not find it necessary to examine the transcript of the witnesses' direct testimony before cross-examining them, being familiar with the substance of their testimony since he had been present when they testified at a preliminary hearing before the Committee on Grievances (Min. p. 161), and made no objection to any testimony taken. In fact, no claim is even here made that any evidence, substantial or otherwise, was improperly received during petitioner's absence. Consequently, it is clear that the determination of the charges against petitioner was in no way affected by his absence during the taking of the direct testimony of these witnesses whom he subsequently fully cross-examined.

In summary, it is respectfully submitted that petitioner was given more than adequate opportunity to be present during the testimony of the witnesses. His repeated failures to abide by agreements he had made, to give notice of requests for adjournments sufficiently in advance so that, if granted, unnecessary trips by out-of-state witnesses could be avoided, and his failure to make any effort whatsoever to obtain permission to be present at the hearings, demonstrate his bad faith. Only by insisting that the direct testimony of the witnesses be taken whether or not petitioner remained, did the referee cause the hearings to proceed. For faced with a record containing the direct testimony, petitioner thereafter proceeded in a reasonably expeditious manner.

II.

The Sixth Amendment right to a public trial is not applicable to disciplinary proceedings; the secrecy attendant to disciplinary proceedings is mandated for the protection of the accused attorney; and petitioner did not timely raise the point.

Inasmuch as a disciplinary proceeding is not a criminal case within the meaning of the Constitution, as we have previously pointed out, the requirement of public trial contained in the Sixth Amendment does not apply. Consequently, New York, like most other States, has been able to protect the accused attorney by statute and court procedure requiring that the existence of a disciplinary proceeding be kept confidential until and unless a final order sustaining charges of misconduct and imposing discipline is entered. Inasmuch as this secrecy provision is intended solely for the purpose of protecting the accused attorney, he may waive it and request public hearings. Such a request is a rare occurrence. The last time it occurred in the First Judicial Department in New York was in *Matter of Ungar,* 25 A. D. 2d 322, cert. den. 385 U. S. 1006, where the hearing was open to the public. Petitioner here not only did not request a public hearing but failed to raise the contentions now advanced in either the Appellate Division or in seeking leave to appeal the order of disbarment to the Court of Appeals of the State of New York. Consequently, petitioner may not now raise the issue, the jurisdiction of this Court not having been preserved since it does not affirmatively appear from the record that the question was presented to the State Courts, *Lynch et al.*

v. *N. Y. ex rel. Pearson*, 293 U. S. 52; *Ellis* v. *Dixon, et al., Members of the Board of Education of the City of Yonkers*, 349 U. S. 458.

CONCLUSION

The petition for a writ of certiorari should be denied.

March 22, 1968

Respectfully submitted,

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APPENDIX

Referee's Report

SUPREME COURT

APPELLATE DIVISION—FIRST JUDICIAL DEPARTMENT

In the Matter

—of—

JOHN B. SANDS,

An Attorney.

APPENDIX

APPENDIX

Referee's Report

SUPREME COURT

APPELLATE DIVISION—FIRST JUDICIAL DEPARTMENT

In the Matter

—of—

JOHN R. SANDERS,

An Attorney.

I, GEORGE TROSK, the Referee appointed herein by Order of this Court dated the 18 day of March, 1965 to take testimony with regard to the charges of professional misconduct against the above-named respondent, as set forth in the petition herein verified the 8th day of January, 1965, and to report the same with my opinion, respectfully report as follows:

Before entering upon the performance of my duties as referee herein, to wit, on April 23, 1965, I was duly sworn before Hon. Samuel M. Gold, one of the Justices of the Supreme Court of the State of New York.

Petitioner appeared herein by John G. Bonomi, Esq., its attorney, Raymond R. Whearty, Esq., of counsel; respondent appeared *pro se.*

Hearings were held on September 15, 1965, on June 9, September 14, October 18, November 3 and 23, December 19, 1966, and on January 10, 1967.

Petitioner's brief to the referee was received on February 21, 1967; respondent has not submitted any.

The Charges

The petition herein alleges that respondent has been guilty of

[2]

"neglect; improper withdrawal of estate funds or, in the alternative, overreaching his client, the administratrix of the estate; misrepresentation; and aggravated failure to cooperate with petitioner's Committee on Grievances in a duly authorized investigation of his professional conduct, in violation of Section 90 of the Judiciary Law and Canons 21, 11, 22 and 29 of the Canons of Professional Ethics."

The specifications under the aforesaid allegation are set forth in four separately numbered charges, the allegations of which will be given in detail below, and which for the moment may be epitomized as follows:

Charge 1: Misfeasance and nonfeasance as attorney for an estate;

Charge 2: Misfeasance, and conversion of $800, the property of the estate;

Charge 3: Misrepresentation, to conceal from a client the non-performance of services respondent had been retained to perform;

Charge 4: Failure to cooperate with the Grievance Committee of the Bar Association.

RESPONDENT'S RESERVATION OF "RIGHTS"

Before discussing the charges and the evidence, it is appropriate to note that some of the testimony of Mrs. Underdown, the complainant in Charges 1 and 2, and of her husband, was received over respondent's objection after he had left the hearing, and that later, before commencing to participate in the taking of testimony at the hearings and cross-

[3]

examining the Underdowns, respondent noted on the record that his presence

> "does not constitute a waiver of my objections heretofore raised as to the right to be confronted by the witness Helen Underdown and her husband, to raise objections to any questions asked, make proper motions and to cross-examine those particular witnesses."

This presents the question whether or not, in the circumstances of this case, the referee abused his discretion in taking testimony from the Underdowns in respondent's absence. On this question, the following are the pertinent, material facts.

Notice of a hearing to be held at 10 AM on September 15, 1965 was duly given to respondent personally and by mail.

On September 9, 1965 respondent was informed, in writing, that witnesses were being brought by petitioner from Washington, D. C. to testify at the hearing to be held on the 15th and "In the circumstances you will be expected to be ready to proceed."

In a meeting between respondent and counsel for petitioner in a corridor of the Criminal Courts Building on September 13, respondent requested an adjournment of the

hearing set for the 15th, stating that he was engaged in a trial—he was about to pick a jury—in a case before Mr. Justice Saypol, and was scheduled, upon the conclusion thereof, to commence another trial before Mr. Justice Postal. Petitioner's counsel pointed out to respondent that he had received approximately a month's notice of the September 15th hearing, which respondent admitted; that the hearing herein, being a matter before the Appellate Division, took precedence over a trial at Trial Term; that in the circumstances respondent was not entitled to proceed

[4]

in the case he was then in, or in the one to follow, and he would be expected to proceed on the 15th. Respondent said he would file an affidavit of engagement.

No further communication, written or oral, was received from respondent by either counsel for petitioner or the referee until, at 10:35 AM on September 15th—a Wednesday—respondent entered the hearing room and stated he had been "held up" at a Calendar Call in the Civil Court—obviously, in neither of the Supreme Court cases to which he had referred in his conversation with petitioner's attorney on the 13th—and that he would not say he had been "forced" on trial in the case before Mr. Justice Saypol, but he had been "technically" on trial since the preceding Thursday, inasmuch as one juror had then been sworn, and since then the rest of the jury had been impanelled; that the first witness was about to be sworn, and the trial would, in respondent's opinion, continue "for a period of possibly two weeks."

Respondent was "trial counsel", not the attorney of record, in the case before Mr. Justice Saypol.

The referee pointed out to respondent that he should have informed Mr. Justice Saypol of the situation—which

respondent admitted he had not done—and that there were two witnesses who had come from Washington, D. C. to testify that morning, as respondent had been informed they would be, and that they were then outside, waiting to be called.

After some colloquy, and with a view to accommodating respondent if possible, the referee had the two witnesses come into the hearing room and explained respondent's situation to them; they were told that respondent had agreed—as he had before they came in—that if they would return on another day, he would pay their traveling expenses in coming to and returning from the hearing, and their hotel expenses while here to testify, as petitioner had [5]
done for the hearing that day, and they were asked whether or not they would be willing to come back on another day on these conditions.

The witnesses stated they would be willing to do so.

Respondent requested the adjournment be for a month, i.e., to October 14; by that time, he said, he would have finished the case he was in, and would have had time, thereafter, to prepare for a hearing herein on the 14th. The matter was thereupon adjourned to October 14, 1965, expressly in reliance on respondent's representation that he would send the Underdowns the money to cover their expenses.

Following the last mentioned session, hearings were scheduled for three successive dates, i.e., October 14, December 7 and March 3. In each of the notices sent to respondent of these hearings he was reminded that the hearing would take precedence over other engagements, and of his obligation to send the Underdowns the money for their travel and hotel expenses in coming to New York to

attend the hearing. In addition, the notice of the March 3rd hearing stated—as the referee requested it should—that the referee directed respondent to advise the referee whether or not respondent had complied with the undertaking to send the Underdowns the money to cover their expenses. Respondent did not respond to that direction.

The aforesaid hearings scheduled for October 14, December 7 and March 3, 1966 were not held, Mrs. Underdown having, after the hearing of September 15th, suffered an accident which disabled her from coming to New York on those days.

On April 7, 1966 respondent was served with Notice that the hearing would proceed on May 4, 1966; on April 14,

[6]

1966 petitioner wrote respondent reminding him that the hearing set for May 4th was an engagement of the Appellate Division, which would take precedence over others, and of his obligation to send the Underdowns the money to cover their travel and hotel expenses.

On April 29, 1966 the referee received from respondent a telegram stating that "due to no fault on my part", the case of United States against Leroy Davis had been marked "ready for trial this week and assigned to a United States District Judge for Monday, May 22, 1966, so that I am actually engaged on trial and unfortunately will be unable to appear in my matter. Therefore, I must, under the circumstances, request an adjournment."

At the referee's direction, petitioner thereupon wrote respondent that his application for an adjournment had been denied; that the hearing would proceed on May 4th, 1966, as scheduled. In that letter, petitioner also notified respondent that on May 4, 1966 petitioner would move to amend its petition to include the additional charges that

respondent had failed to honor his commitment to send the Underdowns their expenses, and had failed to respect communications in reference thereto.

On May 3, 1966 Mr. Justice Breitel held a conference with respondent and counsel for petitioner in reference to a proposed order presented by respondent, requiring petitioner to show cause why the May 4, 1966 hearing should not be stayed. The parties, with Mr. Justice Breitel's assistance, and in his presence, came to an agreement by which the May 4th hearing was cancelled, on the faith of certain commitments—hereinafter described—then made by respondent with reference to his attendance on an adjourned date.

[7]

In accordance with the aforesaid agreement, notice was duly given to respondent of a hearing to be held on June 9, 1966. On that day respondent appeared; his opening statement was: "I am here and I am not here"—and he then went on to say that he was, and for about a month had been, actually on trial in the United States District Court in the case of United States against Aiken, et al., in which he represented Leroy Davis, one of the defendants; that the "nexus" of the case then involved his client, and, if the government finished its direct case, respondent would have to cross-examine within the next half-hour or thereabouts; that he would be in contempt if he failed to appear there at 10:15 AM, and that he desired, and believed it was his right, to be "confronted" by the petitioner's witnesses.

Respondent then stated that when, at the May 3rd conference with Mr. Justice Breitel, he had suggested, and agreed on, June 9th as the adjourned date, he had expected that the trial of U. S. v. Davis, which he had then been in,

would be concluded before June 9th, but that because of the illness of jurors, and deaths in the families of jurors, in that case, it had been necessary to take recesses which delayed the trial; that he was, therefore, not ready to go on, and he requested an adjournment.

The foregoing request had to be considered in the light of (1) what had occurred at the May 3rd conference before Mr. Justice Breitel, as the result of which the May 4th hearing had been postponed to June 9th, and (2) the fact that the Underdowns had again come on from Washington, D. C. and were in the corridor outside the hearing room, waiting to testify.

At the May 3rd conference, the question whether or not the May 4th hearing should be adjourned and, if so, to [8]
what date, was debated and it was finally agreed that it should be adjourned to June 9th, a date selected by respondent, on the distinct agreement by respondent that he would proceed herein on June 9th, whether or not U. S. v. Aiken had previously been concluded, subject only to an earlier hearing herein of the Aiken case should finish in time to have a hearing herein prior to June 9th.

The minutes herein record the following colloquy at a later hearing held herein:

> The Referee: Was it the agreement [before Mr. Justice Breitel on May 3rd] that you were to go on here [on June 9th] whether or not your Federal case had been completed?
>
> Mr. Sanders: That is true, Sir."

Mr. Justice Breitel having said that the arrangement made before him should be put into a written stipulation,

counsel for the Grievance Committee prepared one and, on May 4th, 1966 sent it to respondent in triplicate with a letter of transmittal requesting respondent to sign and return two copies of the stipulation.

The said stipulation contained the following provisions as to what had been agreed upon before Mr. Justice Breitel:

> "5. In the event a hearing herein is scheduled to be held June 9, 1966, and on any continued dates thereafter, respondent is to attend said hearing or hearings, notwithstanding the said criminal prosecution entitled *United States* v. *Aiken et al.* may be then still in progress.
>
> "6. No further adjournments herein will be granted unless application therefore is addressed to the Referee and the same is granted by him."

[9]

The letter transmitting the stipulations to respondent was to the same effect as the stipulation and, in addition, contained this sentence:

> "You will recall that Judge Breitel referred to the date June 9th, which you selected, as a 'copper-clad' date for hearing."

Respondent admits that he received the aforesaid letter and the stipulation which accompanied it, and that he did not sign and return the stipulation. He admits the stipulation accurately recorded the agreement he made before Mr. Justice Breitel; his reason for not signing and returning it, as he admits he expressed it to petitioner's counsel when the latter asked him why he did not do so, was: "I do not want to hang myself." This was before the events which

respondent claimed, at the June 9th session, had intervened since May 3rd to disable him from carrying out the agreement he made that day to proceed on June 9th, and could well justify the conclusion that at the time respondent made that agreement he intended not to perform it.

It was not until June 8th, the day before hearing scheduled for the 9th, that respondent told counsel for petitioner that respondent would not proceed on the 9th although, if the reasons he gave on the 9th be true, he must have known well in advance of the 9th that he would not proceed on that day. In the meantime petitioner, having no reason to suppose that the hearing set forth the 9th would not proceed, as scheduled, had sent the Underdowns the money to cover their travel and hotel expenses—respondent having again failed to carry out his undertaking to do so—and they were here, outside the hearing room, waiting to be called.

It was in the light of the foregoing and the fact that,

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irrespective of any question of fault, no testimony had yet been taken although upwards of a year had elapsed since the Order of Reference, that the referee announced to respondent on June 9th that the hearing would not be adjourned; that the Underdowns would not be required to come back a third time; and that it was up to respondent to decide whether or not he would abandon the hearing.

Nevertheless, the referee also stated that if respondent did not remain, any testimony taken, and any exhibits received in his absence, would be taken and received subject to his right to object, and that he would be given the opportunity in ample time prior to the next hearing—as, in fact he was—to read the transcript of the testimony and the exhibits to enable him to make any such objections at the next hearing; further, that if, after read-

ing the transcript, respondent wanted to cross-examine the Underdowns, a time convenient to all would be fixed, and the Underdowns would then come back for that purpose, provided respondent sent them the money to cover their expenses.

Although respondent declared, referring to his agreement to proceed on June 9th:

> "I am certainly bound by any agreement, I made. I am not trying to avoid that"—

he asked to be "excused", and when the referee declined to "excuse" him, he took an "exception" and left the hearing.

The Underdowns were then examined on direct by counsel for petitioner, Mrs. Underdown for forty-seven pages and Mr. Underdown for six.

Two weeks before October 18, 1966, the date of the next [11]
session, respondent, as he admits, received notice that the minutes of the September 15th hearing, and all the exhibits introduced thereat, were available to him at the Committee's office. However, he did not look at them; as he stated at the October 18th hearing: "I have prepared myself otherwise * * * I didn't think I would need them."

At a hearing held November 3, 1966, the Underdowns were back. Respondent, after first reserving all his "rights" conducted a cross-examination of Mrs. Underdown which covers upwards of a hundred pages of the minutes and a re-cross for five more; his cross-examination of Mr. Underdown covers two pages.

In the testimony given by respondent on his own direct examination, he dealt at length with the testimony the

Underdowns had given and with the documents introduced during their testimony, and he gave his own version of the incidents in reference to which the Underdowns had testified.

Granting that a respondent in a disciplinary proceeding is entitled to reasonable notice of hearing and a reasonable opportunity to confront and examine the witnesses against him [Matter of Eldridge, 82 NY 162, 167 (1880), but see Matter of Young, 284 App Div 406 (1st Dept. 1954)], he may not, after receiving such notice, impede or frustrate the proceeding by walking away from the hearing on the ground that he has another engagement—particularly when such engagement is not entitled to precedence over the one in this court, and the hearing is held on a date to which it had been adjourned five weeks previously at his own request, and on which, in consideration of the adjournment granted him, he had solemnly promised that he would proceed, whether or not such other engagement had previously been concluded.

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In the foregoing circumstances, it is submitted, the referee did not abuse his discretion by taking testimony from the Underdowns on June 9, 1966 (See Matter of Case, 24 App. Div. 2d 797; 3rd Dept. 1965).

Charge 1: The petition alleges:

> On January 25, 1957, respondent, as attorney for Helen Bowman Underdown, of Washington, D. C., the administratrix of the estate of Sylvester F. Bowman, deceased, received $4,570.30, being the net proceeds of the sale of the decedent's interest in a parcel of real property in New York City; on the same day, respondent deposited these proceeds in an account then opened

in the Industrial Bank of Commerce in the name of "Estate of Sylvester F. Bowman, deceased, Helen Bowman Underdown, Executrix, c/o John R. Sanders, Room 4107, 225 Broadway, New York 7, N. Y." Respondent retained the bank pass-book for said account, and failed to comply with the administratrix' requests from time to time for advice as to the use respondent had made of several checks which, at the time of the opening of the account, the administratrix had signed in blank, and delivered to respondent at his request for use in paying estate and realty taxes; respondent also failed to comply with the administratrix' requests from time to time to send her the pass book, cancelled checks and bank statements; in 1962 the administratrix instructed the bank to send said data to her. No partial distribution of the proceeds of said sale has been made, respondent taking the position that no distribution could be made pending the disposition of the Saratoga property, hereinafter referred to.

[13]

The decedent also left a one-half interest in certain real property in Saratoga, New York which, by order made in February, 1958, the Surrogate directed the administratrix to take the necessary steps to sell; respondent thereupon procured an appraisal of the property, but failed to list it for sale with a broker until 1962; on or about May 8, 1963, a prospective purchaser signed a contract to buy the property for $2500, subject to approval by the Surrogate's Court, and delivered to respondent checks representing the full purchase price; respondent did not deposit said checks and did not seek court approval of the sale. Although, at the

time the aforesaid bank-account was opened in 1957, the administratrix, at respondent's request, had signed in blank and delivered to respondent checks to be used in paying the realty taxes, they were not paid, and the City of Saratoga took title to the property in 1960 for non-payment of taxes. In May 1963 the former prospective purchaser of the Saratoga property from the estate bought it from the City of Saratoga at a tax sale.

At a hearing before petitioner's Grievance Committee on May 16, 1963, respondent testified that he was then in the process of applying to the Surrogates Court for approval of the sale of the Saratoga property pursuant to the aforesaid May 8, 1963 contract, and that he would make partial distribution immediately; on June 13, 1963 respondent represented to petitioner's Committee on Grievances that such an application was pro- [14]
gressing, and he estimated it would be concluded in the next several days; on April 16, 1964, respondent represented to the Committee that said purchaser was agreeable to paying the contract price for the property, less the amount of taxes paid; that in fact respondent made no partial distribution until November 1963, and up to the time of the conclusion of the hearings before the Grievance Committee on April 16, 1964, respondent had not applied to the Surrogate's Court for approval of the sale.

THE ANSWER

In view of the way respondent has dealt with this Charge, his answers should be described at length.

In respondent's original answer, verified March 2, 1965, he "denies each and every allegation" in the paragraphs of the petition containing this charge.

At the hearing of September 14, 1966, after respondent conceded that testimony and documents previously introduced showed that many of the allegations of the petition which he had denied in his answer were incontrovertibly true, he stated that he had been pressed to get his answer in on time; that he had had "no opportunity to analyze the petition and properly answer it, as I would have liked" and that it was his intention, and he would, amend his answer "to conform with the truth of the matters which will be adduced upon the record."

Inasmuch as such a course, if followed, would have resulted in the continuing of the hearings with the issues left undefined pending the submission of an amended answer, respondent was requested to state his position orally in the meantime, and thereupon, for the record, he admitted the

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allegations of Charge 1 contained in paragraphs 1, 2, 3, 4, 5, 6, 9, 11, 14 and 15 of the petition; he denied part of paragraph 7, denied knowledge or information as to paragraph 8 and asked that the remaining allegations of this charge—paragraphs 10, 12, 13 and 16 to 20 be left "open".

At the hearing of October 18, 1966, respondent stated that, in order that petitioner's counsel would have an opportunity to see respondent's amended answer in advance of the next session, respondent would serve it "at least a day or two before the next hearing", which had therefore been set for November 3, 1966. Although the amended answer was verified by respondent on October 28th, 1960, he did not present it, or give a copy of it to petitioner's counsel until in the midst of the afternoon session on November

13, 1966. In that amended answer, respondent expressly admits some allegations he had orally admitted at the September 14th hearing, and makes no reference—he neither admits, denies or otherwise alludes to—any of the other allegations of the petition on this charge.

At a later hearing, after some colloquy about the unsatisfactory state of the pleadings, respondent, either categorically or in effect, orally admitted various additional paragraphs of the petition, and denied paragraphs 7, 8 and 13. When his attention was called to the fact that his oral denial of paragraphs 7, 8 and 13 was inconsistent with his written, amended answer of October 28, 1966, which, by failure to deny, admitted all the allegations of the petition, respondent said he would submit a revised amended answer "sometime this week". No revised amended answer has been interposed.

Strictly speaking, therefore, all the allegations of Charge [16]
1 stand admitted. However, if we were to give respondent the benefit of the doubt, and treat paragraphs 7, 8 and 13 as denied, the issues under this charge would be:

(Par. 7):

Were the signed, blank estate checks which the administratrix delivered to respondent about the time the estate account was opened "to be used for payment of estate and realty taxes";

Respondent admits receiving the checks; the denial raises only the question: was he to use them solely to pay taxes, or was he also authorized to fill out one of them to his own order, for $800, allegedly in payment of a fee due him. This contention is

involved in Charge II, which charges respondent with conversion of estate funds by the use of the proceeds of this check.

(Par. 8):

Did respondent fail to comply with Mrs. Underdown's requests from time to time that he advise her of the use made of said blank checks, and that he send her the pass-book, cancelled checks and bank statements;

(Par. 13):

Did Mrs. Underdown ascertain, subsequent to about May 8, 1963, that the City of Saratoga Springs had taken title to the Saratoga property for non-payment of taxes, although she had delivered signed, blank checks to respondent in or about January, 1957 for the purpose of paying them.

Respondent admits the receipt of the checks and the sale of the property for non-payment of taxes. Here again, as in reference to the issue under paragraph 7, the denial raises only the question of whether or not the checks were given to him for use only in the payment of taxes.

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THE EVIDENCE

On March 28, 1955, Helen Bowman Underdown (Mrs. Underdown), a resident and domiciliary of Washington, D. C., was appointed administratrix of the estate of her uncle, Sylvester F. Bowman, who had died on May 19, 1951, a resident of New York County.

The delay in Mrs. Underdown's appointment was due to the fact that the decedent was not known to have left any

assets until it developed, in the course of the administration of the estate of his brother Harry, that Sylvester had a half interest in two pieces of real estate, one in New York City and the other in the City of Saratoga, which were involved in the Harry Bowman estate.

The only assets of Sylvester's estate were his half-interests in the aforesaid two pieces of real estate. The combined appraised value of these two half-interests was $7250.

The New York City property was sold on October 31, 1957 for $11,000. After deducting adjustments made at the closing, and the payment out of cash received at the sale of a fee of $300 to respondent, the estate was left with $4270.

From the closing, respondent and Mrs. Underdown repaired to the Industrial Bank of Commerce, 56 East 42nd Street, New York City, where respondent caused an account to be opened in the name "Estate of Sylvester F. Bowman, deceased, Helen Bowman Underdown, Executrix, c/o John R. Sanders, Room 4107, 225 Broadway, New York 7, N. Y." and the $4270 was deposited therein.

In a Decree dated April 1, 1958, made by Surrogate DeFalco on an Intermediate Accounting, the administratrix was directed "to take such steps as may be necessary

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to sell the decedent's interest in the property located in Saratoga Springs." Respondent then procured an appraisal of the property, which gave the value at $4,000.

Respondent waited about four years, i.e., until 1962, to list the property with a broker for sale.

Respondent gave two reasons for the delay.

Respondent's first reason was that Harry Bowman, who died the owner of a half interest in the property, had left

a will in which he gave his widow, Margaret, a life estate therein and that, consequently, she was entitled to remain therein. In a petition made in 1957, respondent had pointed out that Margaret had elected to take against the will. However, he said, there had been no effort to sell the Saratoga property because the parties interested in the estate did not want to sell the property over Margaret's head. If respondent had kept himself informed as to what was going on with respect to this relatively substantial asset of the estate, he would have known that there was no reason, on that ground, to delay efforts to sell: he would have known that Margaret had been dead for three years before he learned of her death, as he did from Mrs. Underdown, in the following circumstances. Without Mrs. Underdown's knowledge, respondent had entered into a contract to sell the Saratoga property subject to Court approval, for $2500. When Mrs. Underdown learned of this, she tried and tried, without success, to get respondent to respond to her attempts to communicate with him about the value of the property, which she felt was in excess of $2500. Failing in her efforts to reach respondent, Mrs. Underdown went to Saratoga to inspect the property, and there she learned that Margaret Bowman had been dead

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three years, and that others had been in possession of the property for two. On her return from Saratoga, Mrs. Underdown apprised respondent of these facts, theretofore unknown to him.

Respondent had received two checks, aggregating $2500, from his proposed purchaser, but had not deposited them; he never sought Court approval of his proposed sale; Mrs. Underdown repudiated the transaction, and although the

proposed purchaser's checks remained with respondent, the sale was not consummated.

Respondent's second excuse for the failure to take steps to effect a sale of the Saratoga property between the Surrogate's direction to do so in 1958 and his listing of the property with a broker in 1962, boils down, as does his excuse for his other delays and inaction, to his assertion that he was unable to get the necessary "cooperation" from Harry's estate and the other parties interested in the property, i.e., four nieces besides Mrs. Underdown and two nephews, all of whom were of full age and sound mind. This alleged lack of cooperation consisted, according to respondent, of their failure to attend conferences to discuss estate problems, or to agree on what should be done about them, or how. For example, said respondent, this lack of cooperation left the two estates, Harry's and Sylvester's, at odds as to which of them was responsible for the payment of taxes on the Saratoga property, and while they continued to fail to agree, the taxes remained unpaid and the arrearages were permitted to pile up, until the City of Saratoga finally stepped in and sold the property for unpaid taxes—of which Mrs. Underdown was not informed until much later. The purchaser at the tax sale was the same individual as the one to whom respondent had previously contracted to sell the property for $2500, and it was

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reported, subsequently, that he was still willing to pay that amount, less the taxes he had paid at the tax sale, for a deed.

At a hearing before the Grievance Committee on May 16, 1963, respondent testified that he was then in the process of applying to the Surrogates Court for approval of the sale of the Saratoga property to the former proposed pur-

chaser—"I am working on that right now"—and, he said, it would then take "a week or two" to complete the deal with the proposed purchaser. At a later hearing, to wit, on June 13, 1963, respondent told the Committee he was still trying to get agreement among the interested parties about a sale and

> "I would say that within the next three, four, five days, very probably we will be able to distribute, in addition to that, transfer the property."

No application to sell the property has ever been presented to the Surrogate: again respondent attributes his failure to do so to the continued lack of "cooperation" by the interested parties or their attorneys.

Respondent admitted he had not given the Grievance Committee the reasons he gave here for not applying for approval of the sale "in the detail I am doing it now. I just wasn't as thorough * * * that's all I can say."

For all that appears, the Saratoga property is gone; the estate has received nothing for its interest therein, and apparently it never will.

In Surrogate DeFalco's decree on the Intermediate Accounting, he sustained objections to certain reported re-

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ceipts of income and disbursements in reference to the real estate, and directed the administratrix

> "to proceed to account to the objectant for all receipts, income and expenses in connection with the said two properties."

That was on April 1, 1958, and still there has been no final accounting or distribution—again, according to respon-

dent, because of the alleged failure of other interested parties to "cooperate."

Lack of cooperation by interested parties is, of course, no excuse for failure of an attorney to take steps necessary to the prompt and efficient administration of an estate. One might suppose, listening to respondent's attempted avoidances, that he was oblivious of the fact that the Surragates Court is there for the very purpose of overcoming recalcitrance or lack of cooperation on the part of interesfed parties, making such orders and decrees as might be necessary by reason thereof, and that this would be none the less so, even if, as respondent claimed in partial explanation of his failure to seek such relief, he had, for a time, been unable to locate one of the distributees. The fact is that respondent knows his explanation and excuses are insufficient, as a matter of law, as appears from the following colloquy at a meeting of the Grievance Committee held May 16, 1963.

> "Mr. McClung: [one of the members of the Committee]: You seem to me to be a little taking the position that because the parties wouldn't agree here, there was nothing you could do. That really isn't so, is it?
>
> The Respondent: No sir, I don't mean to take that position. I have other matters to state along that line"—
>
> [22]

and again respondent went off on the same tack as before: his inability to get the other interested parties, or their attorneys, to agree on what should be done, or how.

The true reason for respondent's inaction and delays was, as he finally admitted, that at that time the Surrogate's Court was, to him, terra incognita, a labyrinth of

whose turnings he was blissfully ignorant. Thus, when a member of the Grievance Committee taxed respondent with having, by the use of one of the signed blank checks Mrs. Underdown had entrusted to him, taken $800 in the guise of a fee, without court approval, respondent said that the $800 was for services to Mrs. Underdown individually, and not as administratrix. He was unable, there, or here, to point to any service he had performed or was to perform, for Mrs. Underdown individually: he admitted that she had no interest adverse to, or in conflict with, the interests of the estate; that all she could, or did, look for from the estate was the check which she, as administratrix, would hand herself, individually, as a distributee, just as she would do with respect to every other distributee. Moreover, if the $800 was for payment for services rendered to Mrs. Underdown individually, the Committee asked respondent by what right he made out an Estate check to himself in payment therefor. His answer was:

> "I have received checks of this type myself dozens and dozens of times. * * * I would say it is 99% of the practice."

Yet, in the next breath, when he was asked whether or not it was his normal practice to take whatever the Surrogate allowed him for his fee, and also to take a part of what his client received as an estate distributee, his answer was:

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> "I can't answer yes or no. I don't practice in the Surrogate's Court. I practice 95% in the Criminal Court * * * I don't suppose I have had in my entire practice more than two or three Surrogate's matters."

Thus was finally disclosed the true reason for respondent's delays, inaction and misfeasance. He would have done himself a service if he had frankly admitted it here, instead of trusting that the referee would not discover the fact by reading the minutes before the Grievance Committee, and fabricating one improvisation after another, in an effort to suit the occasion as it arose.

In my opinion this charge has been sustained.

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CHARGE II. The petition alleges:

> By decree of the Surrogate's Court dated April 1, 1958, respondent was allowed $700 for counsel fees, $300 of which had been received by him in cash on January 25, 1957, upon the closing of the sale of the New York City property, and the remaining $400 of which he received by the use of one of the checks which the administratrix had signed and left with respondent; on April 2, 1959, without notice to the administratrix, and without approval of the Surrogate, respondent withdrew the further sum of $800 from the Estate account, using another of the aforesaid checks which the administratrix had left with him to pay estate and realty taxes. After having tried, without success, to get the bank pass-book, cancelled checks and bank statements from respondent, the administratrix, in August 1962, had the bank send them to her. The bank statement, when received by the administratrix, showed a withdrawal of $800 on April 2, 1959. She sought, unsuccessfully, to get from respondent an explanation concerning this withdrawal. On August 31, 1962, respondent redeposited $800 in the estate account, he having received, earlier in August 1962, but had not answered, two requests from petitioner's Grievance

Committee to appear at the office of its counsel in connection with a complaint which the administratrix had registered with it. In September 196?, respondent visited the administratrix in Washington, stating to her that he had encountered some difficulty and had

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used the $800, but had replaced it, and requesting her not to appear before petitioner's Grievance Committee.

THE ANSWER

Respondent's original answer, verified March 2, 1965, denied all the allegations in this Charge.

At the hearing held September 14, 1966, respondent orally admitted paragraphs 20, 21, 22 and 23 of the petition, and asked that the remaining paragraphs 24 to 32 be left "open".

At a later hearing, respondent orally denied paragraphs 24, 25, 26 and 32, and admitted paragraphs 27 to 31, inclusive.

His Amended Answer, verified October 28, 1966, expressly admits the allegations of paragraphs 20, 21, 22 and 23 of petition, and makes no reference, by way of admission, denial or otherwise, to any of the other allegations in this Charge.

At the hearing held January 10, 1967, respondent's attention was called to the fact that his Amended Answer, by failing to deny any of the allegations in this Charge, left all of them admitted. He said that had not been his intention, and that he would submit a revised Amended Answer, but he has not done so.

If, despite the foregoing, we treat as denied all the allegations of the charge which respondent had previously denied orally, the issues under this charge would be:

(a) Was respondent's withdrawal of the $800 authorized by Mrs. Underdown;

(b) Did respondent fail to respond to the administratrix' requests that he forward to her the bank pass-book, cancelled checks and bank statements; did she then request the bank to send the data to her and, after receiving the bank statement, did she attempt, unsuccessfully, to obtain from the [26] respondent an explanation of the $800 withdrawal on April 2, 1959;

(c) did respondent visit the administratrix in Washington, D. C., in September 1962 and there state to her that he had encountered some difficulty and had used the $800, but had replaced it, and request her not to appear before the petitioner's Grievance Committee.

The Evidence

On October 31, 1957, Mrs. Underdown, as Administratrix of the Estate of Sylvester F. Bowman, deceased, accompanied by respondent, her attorney, opened an estate account in the Industrial Bank of Commerce with a deposit of $4270.30, the remaining proceeds of a sale that day of the estate's half interest in certain New York City real estate. Respondent took possession of the bank pass-book and directed the bank to send statements of the account and returned vouchers to him, at his office, Room 4107, 225 Broadway, New York, New York 10007.

At respondent's request, Mrs. Underdown then signed, in blank, and delivered to respondent, several checks drawn on the aforesaid estate bank account.

Thereafter, on numerous occasions, Mrs. Underdown tried, by letter and by telephone, to get from respondent a statement of the condition of the bank account, but he did not answer her letters and she was never able to make personal contact with him. Finally, on August 11, 1962, [27] almost five years after the account had been opened, Mrs. Underdown, still in ignorance of what had been going on in the account, wrote the bank, inquiring as to the "status of the account" and requesting the bank to send bank statements and returned vouchers to her, at her address in Washington, D. C.

Without waiting for the receipt of the bank statement, and on August 12, 1962, Mrs. Underdown wrote the Grievance Committee, complaining that respondent had failed to make distribution of the proceeds of the sale of the New York City real estate, received in January 1957, and of his failure to respond to her numerous communications to him.

On August 17, 1962 the Grievance Committee wrote respondent that it had received from Mrs. Underdown a "complaint of neglect" by him, and requesting him to call at the Committee's office on August 31, 1962.

When Mrs. Underdown received the bank statement, she noted that on one occasion $400, and on another, $800, had been withdrawn from the account.

On August 31, 1962 respondent restored $800 to the estate account.

In September, 1962, respondent appeared, unannounced, at the Underdown home in Washington, D. C. and had a conversation with Mrs. Underdown, at which her husband was present. Respondent explained that the $400 withdrawal had been made by his use of one of the signed, blank checks which Mrs. Underdown had left with him: it was

the balance, after crediting the $300 he had received at the closing, of an allowance of $700 which the Surrogate had made to him for his fees upon an intermediate accounting in 1958.

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None of the foregoing is in dispute.

With respect to the $800 check, the evidence is conflicting, and will be discussed below.

Respondent admits that the $800 check was one of the blank checks Mrs. Underdown had signed and left with him at the time the bank account was opened; that he filled it in for $800, making it to his own order. He claimed that he was authorized to do so under a retainer agreement Mrs. Underdown had made with him in his office in 1957.

After first saying that he could not recall the 1957 retainer conversation, respondent testified that in that conversation it was "definitely discussed" that he would apply to the Surrogate for a fee, and that the blank checks left with him were to "cover any and all expenses, whether they be taxes, water, fee or what have you." He had previously told the Grievance Committee that these checks had been left with him for use "in case of an emergency."

Respondent said, also, that he had a written "fee agreement" with Mrs. Underdown for one-half of whatever she would get from the estate for representing her, individually, plus whatever allowance the Surrogate would give the estate, and that when he drew the $800 he "considered" himself "covered" by that agreement. This taking of a fee, it should be noted, was without application to the Surrogate, and would be in violation, even of respondent's own description of his alleged retainer agreement, by which, he said, he was to apply to the Surrogate for his fee.

Elsewhere, respondent relied on an alleged wriften retainer agreement which he said Mrs. Underdown had made, [29] not with respondent, but with Mr. Baker, with whom respondent had been associated until Mr. Baker's elevation to the Bench, at which time respondent succeeded Judge Baker, as attorney.

Respondent was quite specific about the terms of that alleged retainer; he said he had read it, and, according to its terms Mr. Baker was to get one-half of anything that came into the estate, plus one-half of anything Mrs. Underdown got out of it:

> "if the estate got $5,000, Mr. Baker would get $2500 of that * * * and if, out of that [$5000] Mrs. Underdown got $1250, he would get half of that."

Respondent attempted to mitigate his taking of the $800 without the Surrogate's approval, by asserting that the $800 represented not only what was coming to him for the estate, but also what Mrs. Underdown owed him for services rendered to her, individually. He said, however, that he had not attempted to allocate how much was for services for her, individually, and how much was for services to the estate.

Respondent, when before the Grievance Committee, and likewise here, was unable to identify any service which had been performed or was to be performed for Mrs. Underdown individually; he admitted there was no conflict of interest between her, individually, and the estate, and that all she expected individually was the check which she, as administratrix, would issue to herself, as a distributee, upon distribution of the estate, just as she would then issue checks, as administratrix, to other distributees.

Respondent testified that when he called on Mrs. Underdown in Washington in September 1962, she said she remembered "vaguely" signing a retainer; that the only question in her mind was whether it was for one-half or

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one-third; that he told her to look for her copy and he would try to find his, and "In the meantime, I will return the $800 to the account" and she could repay him "when the estate was wound up, if she agreed."

Respondent has not produced any written retainer agreement by Mrs. Underdown with either him or Mr. Baker, and she denies there ever was one.

Respondent testified that as the result of "burglaries, thefts, larcenies and evictions" of which he had been the victim, the written retainer has "disappeared". He testified that Mr. Baker's secretary might recall the terms of the retainer, and one hearing was adjourned to enable him to try to locate her, and when, on January 10, 1967, the hearings were closed, it was with the expressed understanding that if respondent located her at any time before the referee filed his report, the hearings would be reopened to receive her testimony. There has been no further word from respondent.

I put no stock in respondent's assertion that he thought Mr. Baker's secretary might help him establish the existence of the retainer. If respondent's testimony be true he knew, when he left Mrs. Underdown in September 1962, that it would be important for him to establish that, by the terms of the retainer, he was entitled to take the $800; he left her with the statement that, when he got back to New York, he would search for it. Obviously he did not find it. He must have realized then the importance of locating proof of its terms; the importance of doing so was fur-

ther impressed on him in May 1963, when he received the Committee's charge letter, and if he was not fully aware of it, even then, he certainly learned it during the hearings before the Committee commencing shortly thereafter.

In these circumstances it is inconceivable that he would have waited until the hearings before the referee were almost over to start trying to locate Mr. Baker's secretary.

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The Saratoga property having been taken by the City of Saratoga for non-payment of taxes, the only asset on which the estate could, or did, realize anything was the New York City property. Under the terms of the retainer agreement, which respondent testified Mrs. Underdown had made with Mr. Baker, he would have received one-half of the $4570.30 which the estate received, net, for the New York City property, i.e., $2285.15, and the distributees would share what was left of the remaining $2285.15. The record does not show the per stirpital shares of the distributees—five nieces and two nephews—but the testimony is that Mrs. Underdown has received $812.73. On that basis, Mr. Baker would have been entitled to receive, from Mrs. Underdown, an additional $406.36, making his total $2691.51; Mrs. Underdown would have been left with $406.36, and each of the other six distributees, assuming they shared the remaining $1472.42 ($2285.15 — $812.73) equally, would receive $245.40.

As far as respondent is concerned, he received $700 by Court allowance and he claims he was entitled to the $800 he got through the medium of the blank check he filled in—a total of $1500; as against which the Underdowns got $812.73, and each of the other six distributees, assuming they would share the remaining $3757.57 equally, would

receive $626.26. A retainer agreement by an estate attorney which would work out in such fashion would be invalid, and no Surrogate would permit it to be enforced (In re Gasco, App. Div. 2nd, Dec. 1966; 275 N. Y. S. 2d, 871 n.o.r.; Re Young, Surr. Suff. Co. Dec. 1966; 275 N. Y. S. 2d 897, n.o.r.).

Mrs. Underdown testified that one of the other parties interested in the estate advised her to retain Mr. Baker;

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that she retained Mr. Baker by telephone, she being in Washington and he here; that she has never met Mr. Baker, and that she never had any agreement with him, written or oral, for the payment of any specified amount or percentage; that when Mr. Baker was elevated to the Bench, respondent took over "as is", and there was never any conversation between them as to fees.

Mrs. Underdown's attention was called to the fact that according to the minutes of her testimony before the Grievance Committee, she testified there that Mr. Baker's fee was to be one-third of what she got. Mrs. Underdown testified here that she did not intend to say that; that her appearance before the Committee was her first experience at a hearing, and she was "confused and nervous" and "upset"; that her arrangement with Mr. Baker was that he was to get a "percentage", but "At no time did we agree to one-third or one-half or one-fourth or anything"; that no "percentage" had been stipulated, they never got down to "fractions", because Mr. Baker said that they did not know the worth of the estate, what taxes they would have to pay, or what she would receive; it was her idea that when the time came to make out a bill, Mr. Baker would get "his natural allowed amount."

Mrs. Underdown testified that there was no conversation with respondent about representing her in any capacity other than as administratrix, and she never understood that he did.

Mrs. Underdown testified that respondent told her that the checks she signed in blank—like respondent, she first thought, but she was not positive, there had been three, whereas there had been five, two of which were never used

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—were to be used for the payment of taxes, and there was no conversation about using any of them for the payment of fees.

Mrs. Underdown testified that she never authorized the drawing of the $800 check, and that she did not learn of the withdrawal until, in response to her request, she received the Bank's letter of August 21, 1962, transmitting the statement of the estate account. This is corroborated by Mrs. Underdown's letter of August 15, 1962, to the Grievance Committee, in which she complained of respondent's failure to distribute the proceeds of the sale of the New York City property, received in 1957, and his failure to answer her letters, although he was "paid" a retainer's fee of $300 of the Estate money", but makes no mention of his having received an additional $800—which, of course, she would have referred to in her complaint if she had known of it. This also refutes respondent's "belief" that he told Mrs. Underdown, not "specifically", but "in a general way", that he was going to draw the check.

Mrs. Underdown testified that when respondent came to her home in Washington, there was no reference to fees and the $800 check was not discussed; that respondent told her he had been in "some difficulty", and had used the

money. Respondent's testimony that on that occasion he said that, in view of the difference of opinion between them about the $800 withdrawal: "I will return the $800 to the account", is demonstrably untrue: the bank statement shows that he had already returned it—the deposit was made on August 31, 1962, which was after respondent had been informed by the Grievance Committee of the receipt of a complaint from Mrs. Underdown, but prior to respondent's visit to Washington, which was not until September, 1962. [33a] Respondent's concern on that occasion was to get Mrs. Underdown to withdraw her complaint to the Grievance Committee: he said if she would not appear before the Committee he would return the $700 in fees which he had received.

Mrs. Underdown was corroborated by her husband, who heard her end of her telephone conversation with Mr. Baker at the time of his retainer, who accompanied Mrs. Underdown on all her visits to New York in reference to this matter, and who was present at the interview with respondent at their home in Washington.

Mrs. Underdown impressed me as a frank, straightforward and truthful witness, with an excellent memory, and I would have believed her in preference to respondent, whose veracity left much to be desired, even if she had not been corroborated by her husband, who also impressed me as entirely credible.

I am convinced that there never was a retainer, written or oral, by which Mrs. Underdown agreed to pay Mr. Baker, or after him, respondent, any specified fraction or percentage of the amount of the estate, or of what Mrs. Underdown would receive therefrom; that respondent

was not authorized, or entitled, to use, for the payment of his fee, any of the signed blank checks which Mrs. Underdown left with him; that he never told Mrs. Underdown that he intended to use, and she never authorized him to use, any of those checks for the payment of a fee to himself; that his drawing of the $800, and his using the proceeds thereof, were improper, and that his testimony to the contrary of the foregoing was knowingly untrue.

In my opinion this Charge has been established.

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CHARGE III. The Petition alleges:

> Respondent was retained by Top Hall Social Club in August 1962 to procure its incorporation; in October, 1962, respondent prepared and delivered to the president of the club a letter stating:
>
> > "This is to inform you that the approval of your corporation (stock) is in the hands of the undersigned and you are competent to operate under a charter and certificate of incorporation"—
>
> whereas, in fact, the club's Certificate of Incorporation was not issued until, and was dated, June 12, 1963.

THE ANSWER:

All the allegations of this charge were denied in respondent's verified answer. In his amended answer, they are all admitted, by failure to deny.

Respondent's failure to undertake to revise his amended answer on this charge, as he did on the others, stems from the fact that, by the time his attention was called to the state of the pleadings, the president of the club had al-

ready testified and respondent seemed content to let the matter stand that way.

The Evidence

Respondent admits that on or about August 9, 1962, he was retained, and was paid a fee, to procure a Certificate of Incorporation for a group who called themselves "Top Hat Social Club", and that on October 30, 1962, respondent wrote, and signed, a letter to Nathaniel Sligh, the president of the club, in which respondent said:

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> "This is to inform you that the approval of your Corporation (stock) is in the hands of the undersigned and you are competent to operate under a charter and Certificate of Incorporation.
>
> Though we did experience some difficulty in obtaining same, requiring me to appear in Albany twice * * * we were finally successful."

The letter then referred to the need of a meeting to discuss the "corporate outfit" which would be needed, following the obtaining of which there would be a "formal meeting for the very serious purpose of corporate organization."

Sligh testified that he told respondent that members of the club were complaining about the delay in getting the charter; that they were giving Sligh a "hard time", and that respondent wrote the letter in response to Sligh's request that respondent give him something "to get the fellows off my back."

The letter was completely false: the Certificate of Incorporation had not been issued and, in fact, was not issued until about eight months later, i.e., on June 12, 1963.

Both respondent and Sligh testified that the delay had been caused, in part, by the unavailability of several successive names which club owners had suggested, and by the illness of respondent's wife. It is difficult to believe that inability to find an available name, and respondent's wife's illness, could have caused a delay of about ten months from the time of retainer to the time of getting the Certificate, and it is clear that Sligh, despite his testimony, knew that there was no adequate excuse for the delay. Thus, as late as March 14, 1963, Sligh, as president of the club, joined [36]
with DuBois, the Secretary, in a letter to respondent in which, in the name of the club, they wrote:

> "We have grown tired of waiting to hear from you pertaining to the charter that you were to obtain for us * * * you have failed to at least notify us as to the progress you have made."

and the letter stated, further, that unless respondent sent the charter within seven days from the receipt of the letter, which was sent by certified mail, the club would take

> "some form of legal action."

If, in fact, the delay had been caused by the reasons testified to by respondent and Sligh, no one would have known of them better than the members of the club themselves, and there would have been no need to give a false reason to help Sligh get them "off my back." The letter was, obviously, respondent's contribution to a scheme to conceal his neglect from his clients, the members of the club.

In my opinion this charge was sustained.

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CHARGE IV: The petition alleges:

> In seven specified cases, respondent (1) made either no, or an inadequate, response to letters from the Grievance Committee's counsel requesting information in regard to complaints against respondent therein described, or to respondent's failure to respond to previous letters or invitations in reference thereto, and (2) failed to appear in connection therewith when requested, except at hearings before the Committee after charges had been preferred, or at the specific direction of the Committee during the course of said hearings.

THE ANSWER

Respondent's original answer denied all the allegations of the petition in reference to this charge.

At the hearing on September 14, 1966, respondent asked that these allegations be left "open", to permit him to examine the letters.

In respondent's amended answer, he

> "admits that in some instances (a through g) letters were not answered but an explanation of respondent's position was given or the reason no explanation could be given at that time was tendered, but in no event was he guilty of neglect."

During the October 18, 1966 hearing, petitioner gave respondent notice that it would apply to the referee for leave to amend this charge by adding additional cases, in which the communications to which respondent had failed to re-

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spond had been sent too late to be referred to in the petition, and that if leave to amend were denied, petitioner

would offer the letters as evidence of a common plan or usage of respondent to ignore petitioner's request for information. The motion was subsequently made, and respondent having failed to show that adding these communications by amendment of the petition would affect him any differently from what they would if they had been originally included therein, the motion was granted. (See In re Rosenberg, 276 App. Div. 268, 271, 1st Dept. 1950; Matter of Horovitz, 228 App. Div. 484, 485, 1st Dept. 1930), and the letters were received in evidence.

The exhibits introduced under this charge and the amendment thereof were given numbers 17 to 38, inclusive, though in some cases the exhibit includes more than one letter.

THE EVIDENCE

It would be unnecessarily repetitious to refer to the contents of each of these letters referred to in this charge: reference to a few typical ones will give the general tenor of all of them.

The opening letter in the series here involved, dated August 17, 1962, requests respondent to appear at the Committee's office in connection with a complaint which had been made against him, and continues:

"Heretofore it has been generally our experience, when seeking to secure information from you regarding complaints concerning your professional conduct, that several such requests were necessary before you saw fit

[39]

to respond to them. You are reminded that failure to cooperate with this Committee also constitutes professional misconduct and it is urged that there be no repetition of that experience in this matter."

Letter after letter was sent to respondent requesting him to call at the Committee's office in reference to other complaints which had been made against him. One such letter, dated November 28, 1962, reads, in part:

> "You are advised that you have heretofore failed to keep some half dozen appointments to call at this office to discuss certain matters pending before us."

Another letter, this one dated June 24, 1964, refers to respondent's failure to respond to two earlier letters and contains the following:

> "It should be unnecessary to remind you that it is precisely this pattern of continued non-cooperation which, in great measure, has led to prior charges against you and hearings thereon by the Committee on Grievances. If you persist in ignoring our inquiries concerning the asserted misapplication of moneys delivered to you by Milton E. Turner, it can only result in additional charges."

The refrain throughout is the same: the failure to answer letters advising respondent of the receipt of complaints against him by his clients, and requesting a statement from him of his position in regard thereto; the continued failure to pay attention to successive requests for replies to letters sent him; letters calling attention to the inadequacy of an-

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swers which respondent had made to earlier inquiries; the failure to respond to requests to call at the Committee's office in reference to complaints against him; the failure, sometimes persistent and continuous, to keep appointments previously made, etc., etc.

Respondent's answer to all this is that he had been engaged in the trial of the Pugash case for four months, and that immediately following that engagement he was prevented from consulting some of his files because Mr. Baker had denied him access to them for respondent's failure to pay his office rent.

These excuses are sham. Respondent relation to the Pugash case ended in late fall or early winter of 1961: the Underdown letters referred to in the petition run from August 17 to November 28, 1962, those in *Houghton* were dated October 10, 1962 and June 17, 1963; in *Kent*, they were in late 1962, and May 1963; in *Nelson* they did not begin until May 1963; in *Smith* the letter was dated October 2, 1963, and in *Obledo* and *Anglin*, it was dated December 17, 1963.

Obviously, respondent's preoccupation with the Pugash case, and his alleged difficulty with Mr. Baker immediately thereafter, furnish no excuse for respondent's contemptuous attitude toward the Committee's aforesaid letters—in many case a failure even to acknowledge them—or his unexplained failure to keep appointments which he had made.

When he was before the Grievance Committee, respondent said:

> "99% of these complaints got here because of a failure to communicate between myself and the clients, the inability to communicate at the time. I find myself in better circumstances now, and I can assure this Com-
>
> [41]
>
> mittee that from hence forward I will not be derelict and not fail in any matter so far as the practice of law is concerned."

Despite respondent's aforesaid assurances to the Committee, we find the same pattern of disregard of its communications thereafter, as witness the letters introduced under the amendment of the petition, which run during a period commencing February 1964 and ending September 1966.

With respect to these communications, respondent stated that he had not had time to consult his records in reference to the matters therein referred to, and when the hearings were about to close he requested, and was granted, permission to submit a written answer to the charge based on them, which answer, it was agreed, would be accepted with the same effect as if he had so testified at the hearing. Respondent has not submitted any such writing, nor has he offered any excuse for not doing so. The charge, to the extent it is based on these letters, is, therefore, admitted.

The failure of an attorney to cooperate with the Grievance Committee is unprofessional conduct. "Such conduct", this Court recently said,

> "Cannot be overlooked or condoned * * * Full and forthright cooperation with the committee is essential to the proper performance of its function, and the withholding of such cooperation without cause must be judged a grave disservice to the public interest." [Matter of Hubscher, 25 AD 2d, 113, 114 (1 D. 1966)].

See also, to the same effect:

Matter of Pines, 26 A. D. 2d, 424 (1 D. 1966);

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Matter of Sultan, 26 A. D. 2d, 210 (1 D. 1966);
Matter of Somers, 22 A. D. 2d, 325 (1 D. 1965);
Matter of Thomson, 23 A. D. 2d, 441.

Respondent's lack of respect for his professional obligations is reflected not only in the way he ignored communications from his clients and from the Committee, but by his conduct in these proceedings. As examples: his long continued failure, before finally doing so, to carry out his promise to send the Underdowns the money to cover their expenses in attending the hearing herein, despite the fact that his promise to do so was the consideration of the granting to him of an adjournment he requested; his disregard of the referee's direction to notify the referee whether or not he had performed that promise; his failure to sign the stipulation pursuant to the arrangement made in the conference with Mr. Justice Breitel for the hearing on June 9, 1966, and his failure to proceed in accordance with the promise he made at that conference; his failure to serve his amended answer within the time he promised he would; his failure to serve a revised amended answer, for which permission was granted in response to his request, and in the absence of which all allegations of charges I, II and III stand undenied; his failure to submit his explanation with respect to the letters added by amendment to Charge IV, after being granted permission, at his request, to do so in lieu of oral testimony; his failure to acknowledge receipt of documents sent to him at his request by the referee, despite the referee's request, in the letter of transmittal, that he acknowledge receipt thereof. [43]

In my opinion this charge was sustained.

New York, March 10th 1967

Respectfully submitted,

GEORGE TROSK
Referee